AN

ENQUIRY

INTO THE

FOUNDATION AND HISTORY

OF THE

LAW OF NATIONS IN EUROPE,

FROM THE

TIME OF THE GREEKS AND ROMANS,

TO

THE AGE OF GROTIUS.

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Semina nobis Scientiæ dedit Natura, Scientiam non dedit.——SENECA.

IN TWO VOLUMES.

VOL. I.

DUBLIN:

PRINTED BY P. WOGAN, P. BYRNE, W. JONES,
AND J. RICE.

1795.

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PREFACE.

THE following work was originally intended to be nothing more than the preliminary diſcourſe to one much leſs ſpeculative, and of a more confined range.——I had, as well from taſte, as from views of a private nature, which it is immaterial to mention, been led much to the ſtudy of the Law of Nations. I had thrown together a body of notes upon the particular parts of it, which were more immediately the object of my enquiries, and I conceived the deſign of collecting them into a work, which would have been called "A Treatiſe of Diplomatic Law."

The nature of Sovereignty, and the rights of independent States: the manner in which they were created, and their mode of communication by Ambaſſadors; the different ſorts of Embaſſies, and the conſequent diviſion of the Repreſentative Character into Miniſters of the firſt and ſecond order; their rights and privileges, particularly their inviolability; the rank and pretenſions of the nations of Europe; the nature and laws of Negotiation and Treaty; the legal ſources of their authority, and the mode of their interpretation; all this I meant to conſider.

I had collected my materials, and made my arrangements; the authorities, the facts, and the caſes were ready, and I had nothing to do but to put them into language.—But, previous to this, a very important conſideration engaged my attention, which, though it has moved the enquiry of every man that ever came to the ſtudy of laws, muſt for ever be intereſting, and has not always been ſatisfactorily diſpoſed of. I mean the account of that obligation in general, un-

der which we conceive ourſelves bound to obey a law, *independent* of thoſe reſources which the law itſelf provides for its own enforcement. I was more particularly called to this conſideration on the ſubject before me, becauſe the law of which I was about to treat, having no common tribunal to execute its decrees, men were left merely to their conſciences to determine whether they would obey it or not. Upon turning to the fundamental parts of all the treatiſes I had peruſed, I found myſelf referred to the Law of Nature for the real and original ſource of all the obligation in men to obey the Law of Nations; and this Law of Nature again, I was told to look for in my own heart and natural conſcience, which were to decide for me *and all the world* in the ſame manner, in almoſt all caſes. At the ſame time, theſyſtem of the Law of Nations was neither more nor leſs than a particular, detailed, and ramified ſyſtem of morals, in which departure was made from that great outline, and thoſe general perceptions, conſtituting the Law of Nature, and we were brought to the minute application of them to caſes and doctrines to particular ſets of people. All this, notwithſtanding, was ſuppoſed to be really binding upon *all the world*, though it was confeſſed that all the world did not, and would not obey it. Caſes of nicety even were brought forward and canvaſſed upon general principles, which *all*, it was held, were bound to obſerve, and they were therefore called upon to think alike of theſe *particular* caſes, although they were a mere *application* of the general principles, and about that application, different writers were far from being agreed.

I own this never ſatisfied me; and when I conſidered how difficult it was *for the whole of mankind* to arrive at the *ſame* ideas of moral good, from the prejudices of education and habit, in the different ſtages of ſociety in which they might be; more particularly when I recollected the great difference of opinion that was among very learned men, of the ſame nations and ages, and who had had the ſame ſort of education concerning the Law of Nature itſelf; I was ſtill more ſtaggered in my belief that *all* the world were bound to obey the ramified and definite ſcheme of duties called the Law of Nations.

When I examined into my own belief concerning my obligation to obey this Law, I found it well fortified, and ſufficiently firm. But it was ſo, from a particular ſet of opinions which I had imbibed from education and the force

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of example, confirmed and directed by the authority and precepts of a religion in which I believed. Something certainly might be derived from my own natural propenſities and feelings; but theſe laſt were far leſs diſtinguiſhable than the firſt; and had they been wholly independent of them, I found that they *perhaps* might not carry me ſo far as I certainly was willing to go, under the influence of thoſe other weightier conſiderations. Still leſs, therefore, did I conſider, that other perſons, who had perhaps been taught by education, example and religion, to think of their duty towards their neighbour in a manner totally different from what was laid down in *our* Codes of the Law of Nations, could be bound to act exactly in the way preſcribed by thoſe codes. Neither could I imagine that I had any right to act towards all other people as if they had *broken a law*, to which they had never ſubmitted, which they had never underſtood, or of which they had probably never heard. Where we were under the expreſs commands of the Deity concerning them; or where they profeſſed to obſerve a Code, ſo directly the oppoſite of ours, as to interfere with our happineſs and juſt rights; then, indeed, I could conceive we might act towards them as towards *enemies*, whoſe diſpoſition it was, like beaſts, to prey upon us; but even then I did not perceive the fairneſs of conſidering them as amenable to the laws we choſe to purſue, or as puniſhable for *breaches* of thoſe laws.

It followed, therefore, that, although I myſelf could make out the obligation of the Law of Nations as laid down in the *European* Codes, and that others of the ſame claſs of nations, and the ſame religion with myſelf, could, and were bound to do ſo too; yet that the law was not obligatory upon perſons who had never been called upon to decide upon its ramifications; who might widely differ as to its application, and even as to its general and fundamental principles. The hiſtory of mankind confirmed to me that there was ſuch a difference in almoſt all its extent; that men had the moſt oppoſite opinions of their duties towards one another, if not in the great outline and firſt principles of thoſe duties, yet moſt certainly in the application of them; and that this was occaſioned by the varieties of religion and the moral ſyſtems which governed them, operated upon alſo by important local circumſtances which are often of ſuch conſequence in their direction.

Under all these points, it appeared to me, that we expected too much when we contended for the *universality* of the duties laid down by the Codes of Law of Nations; that, however desirable such an universality might be, the whole world were not susceptible of that intimacy and closeness of union, which many philosophers of high name are willing to suppose; that it falls into different divisions or *sets* of nations, connected together under particular religions, moral systems, and local institutions, to the exclusion of other divisions or sets of nations; that these various divisions may indeed preserve an intimacy among one another, and obey the same law; but that they may be contradistinguished from others who may have different religions, and moral systems, operated upon by very different local circumstances: in fine, that what is commonly called the Law of Nations, falls very far short of *universality*; and that, therefore, the Law is not the Law of *all* nations, but only of particular classes of them; and thus there may be a *different* Law of Nations for *different* parts of the globe. Not only this, but even, in the same part of the globe, there may have been very different sorts of Law of Nations, according as revolutions have taken place in the religion, system of morality, and local institutions of the nations which compose it.

All this was to be proved from history, if proved at all. And, if the Theory was a just one, as any class of Nations would afford a proof of it, I set myself to a very serious examination of the history of the people of Europe, (as that in which we are most interested,) not with the old view of enquiring into their *general* manners and customs, their politics, their feats of arms, or their arts; but with the design to get at the maxims which governed their intercourse together, at various times, and under various revolutions in their manners; and these I resolved to set forth in detail, as a supplement and proof of the theoretical reasoning which I have mentioned.

This arrangement, however, as must be evident, took in a subject so vast, that to treat of it properly would far surpass the bounds of a mere preliminary discourse. At the same time it appeared to me to be fully of as much, or perhaps of more consequence than the work which had originally given rise to it; and as professional occupations prevented me from finishing the whole, I resolved to abandon

don my firſt plan altogether, and to confine my attention to this other ſubject which had thus grown out of it. And well have I been repaid for the labour it has coſt me; ſince my mind has been minutely occupied by a ſeries of the moſt important and intereſting ſubjects, of which, before, it had but a general idea. For although very great maſters have gone over all, or moſt of the ground I have taken, before me; yet they have done ſo in a very different manner, and with far different objects. Thus, although the facts I have brought together in the hiſtorical part of the following pages, have moſt of them long been known, and many of them form the materials of very popular hiſtories; yet the view with which I came again to their contemplation, made them appear to me in a new light; and although I had attended to moſt of them before, yet I acquired from them freſh entertainment, becauſe they afforded me freſh inſtruction.

The facts of hiſtory indeed lie open to every man's obſervation; and every man draws concluſions from them, according as the bent of his mind, his profeſſional purſuits, or any particular purpoſe inclines him. In this reſpect, hiſtory would be valuable, were it no more than a dry ſeries of events, brought together with accuracy and clearneſs for philoſophy to work upon. This, in ſome meaſure, has been the caſe. The firſt hiſtories are ſhort and rude, and *apparently* uninſtructive, from the want of proper comments. In proceſs of time, men have diſtinguiſhed themſelves, and done good to the world, by the uſe which their obſervation and judgment have made of them, and they then aſſume a variety of different and novel forms. Thus, from the ſame collection of facts, one has drawn a hiſtory of man; another, of the progreſs of ſociety; a third, of the effects of climate; a fourth, of military atchievements; a fifth, of laws in general; a ſixth, of the laws of a particular ſtate. But it has never yet been the fortune of the annals of the world (at leaſt not within my knowledge) to produce, from any commentator, A HISTORY OF THE LAW OF NATIONS.

In this point of view, hiſtory may be compared to a vaſt and diverſified country, which gives very different ſorts of pleaſure to different travellers, or to the ſame traveller if he viſits it at different times. One travels to acquire a knowledge of men; another to ſurvey the political reſources of the

the ſtate; another with a view to its commerce; another for mere pleaſure: and the ſame people, the ſame cities, and the ſame inſtitutions, will afford high and varied ſatisfaction according to the ſpirit of mind in which they are viewed If the compariſon hold good, I ſhould hope that little apology is neceſſary for bringing before the world, many facts and caſes already well known to it, but all the conſequences of which are, perhaps, not ſo well known. Thus for example, every one knows that *Charlemagne* renewed the Weſtern Empire; that the *Hanſeatic League* was a powerful commercial aſſociation; that the *Queen* of *Scots* was put to death by *Elizabeth*, contrary to juſtice; and that priſoners of war uſed to pay large ſums for their liberty to thoſe who took them. Yet thoſe who have related all theſe things, were not perhaps led to conſider what relation they bore to the LAW of NATIONS at the time when they happened; the real nature of the Imperial title thus acquired by *Charlemagne*; the queſtion of the *ſovereignty* of the Hanſeatic alliance; the effects, as a precedent, *in point of law*, of the caſe of Queen MARY; nor the rules, public and private, by which the cuſtom of RANSOM was governed.

In the relation of any tranſaction, however, I have ſtudiouſly avoided all thoſe parts of it which did not appear to be directly relevant to the point immediately before me: and I have gone from one hiſtory and one age to another, and from one part of the ſame tranſaction to a different part of it, as it ſuited the enquiry I was upon, without ſtaying to complete any account which I had begun, when ſuch completion was not neceſſary for the purpoſe with which I wrote.

In conſidering the effects of certain great local inſtitutions upon the Law, ſuch as the FEUDAL SYSTEM, the ECCLESIASTICAL ESTABLISHMENTS, the CRUSADES, or CHIVALRY; I have not even attempted to give any account of the Inſtitutions themſelves; but ſuppoſing them perfectly well known to the reader, or referring him to ſuch authors whoſe profeſſed object was to treat of them; I have barely ſelected ſuch parts of them as are connected with my own ſubject: thus, the hiſtory of Fiefs; the particular duties of vaſſal and Lord; the account of the papal uſurpations over the *Clergy* of particular kingdoms; the cauſes or hiſtory of the Cruſades; the minutiæ of the military

duties

duties of Knights; the law and cuſtom of Tournaments, or the riſe and fall of Chivalry in general; all theſe I have purpoſely avoided, and have buſied myſelf alone about thoſe parts of them which bore upon the maxims concerning the public intercourſe of nations.

It follows, therefore, that thoſe who come to the peruſal of this work ought, in common juſtice to the ſubject, to be in poſſeſſion of much previous knowledge. It follows alſo, I hope, that however obliged I may be to the learning and patience of thoſe who have gone before me, upon the progreſs of mankind; yet the manner in which that ſubject is now treated, is not deſtitute of novelty. Upon many of the above-mentioned points, men of high characters for learning and ſagacity, have dived into antiquities, and have erected ſyſtems. It has been my part to conſider how thoſe ſyſtems operated upon the Law of Nations; a queſtion which they thought too remote from their ſubject, or which they never thought at all of conſidering. Thus Pfeffel, Monteſquieu, St. Palaye, Selden, and Robertſon, have with great diligence and learning ſurveyed particular parts of the hiſtory of Europe, with a view to their own particular purpoſe. I have largely profited by their labours, and have followed them with great reſpect through thoſe erudite and critical diſquiſitions which led to the ſettlement of doubtful points, the elucidation of which was neceſſary before my own enquiries could even begin. At the ſame time I have by no means always contented myſelf with the mere authority of their names; but have gone over, wherever I had opportunities of ſo doing, the original documents on which they have founded their reaſoning. Much indeed have I to wiſh that theſe opportunities had been greater; but ſuch is the immenſe maſs of their knowledge, and the extenſive range of their ſubjects, that I had neither time, nor materials, nor abilities, to purſue them minutely through all the intricacies which they have unravelled. From the little, however, which I was enabled to do myſelf, I gained much. It imprinted the important matters contained, more ſtrongly on my mind; it added greatly to my own ſtores; it taught me where to look for much neceſſary learning, and enabled me, if ſuch preſumption may be allowed, to gather up ſome few things which had eſcaped their attention. Some of the niceties of the Feudal Syſtem, which might have been

gained

gained from *Beaumanoir* and *Du Cange*, and the entire diſcuſſion concerning the rank and claims of the Emperor, which Robertſon has wholly paſſed by, may probably prove this.

Theſe obſervations, however, relative to thoſe who have preceded me, are not to be extended beyond a ſmall part of my ſubject. In the diſcuſſion of many points I had not the benefit of their aſſiſtance, and was left entirely to my own reſources, ſuch as they were. Almoſt the whole, for example, of the *Hiſtory of the Law of Nations*, of the critical chapters upon the effects of Treaty and Convention, and the Rank and Claims of the Nations of Europe, were to be collected alone from a careful attention to a dry ſeries of early Treaties, or the compariſon of a number of inſulated facts. I have endeavoured alſo, all the way through to engraft as much new matter as my own ſtudies could acquire, upon the maſs which had been gathered together by the critics and hiſtorians I have mentioned; and for this I was driven to the inſpection of many of the monks, and of thoſe vaſt collections of laws which do ſo much honour to the patient labour of the antiquaries.

Such then is the view which I have attempted to take, and ſuch the authorities I have ſought in the *hiſtorical* part of the following Treatiſe. I will not flatter myſelf by ſuppoſing that its ſcope is *entirely* new; but I am not unwilling to hope, that opinions which have hitherto rather been hinted than detailed at large, have here been brought forward under an ample and accurate form. For it has been my beſt endeavour to fix in their proper place, and to ſet in a broad and clear point of light, opinions upon the facts of hiſtory which are only to be collected by dint of much reflection, and the frequent compariſon of things which paſs off in the general detail, as matters of little conſequence.

Upon the whole, then, the work which is now preſented to the world, may be ſaid to conſiſt of two parts. The firſt is occupied with endeavouring to ſettle the conſtruction of the Law of Nations: and above all, as moſt neceſſary to the fabric, what is its real foundation. In this our attention is moſt claimed by an enquiry into the obligation of Natural Law, and the endeavour to diſcover whether that Law can conduct us, and *the whole world*, to think exactly in the ſame way concerning thoſe definite and particular

ticular ſchemes of duty which compoſe the province of moral philoſophy. And in this very important enquiry, that I may not be miſtaken, I beg leave here to obſerve, that I intend not by any means to *reject* the Law of Nature as forming a *part* of the foundation of the Law of Nations! but ſimply to point out, that while men have been known to entertain ſuch diſcordant opinions concerning the *ramifications* of that Law, it cannot lead us to that certainty concerning virtue, which would oblige *all mankind* to think of it exactly in the ſame manner: If this is ſo, therefore, that we muſt look to ſomething elſe as the *binding principle* of DUTY, and that thoſe only we can expect to think alike, concerning it, who are known to have the ſame opinions concerning the *binding principle*. I by no means intend to ſay, that into the compoſition of this *binding principle*, the Law of Nature, *according to our ideas of it*, does not enter. But I hold that there may be others who have alſo *their* Binding Principle, for the moral ſyſtem which *they* chuſe to follow, into which the Law of Nature, according to *their* ideas of it, may *alſo* enter: and if theſe two ſyſtems ſhould recommend very oppoſite things as *duty*, the Law of Nature being thus (*under different interpretations*) common to both, we cannot expect an *uniformity* of opinions, merely becauſe we chuſe to ſay that they reſt upon that Law.

If this therefore be juſt, I hold that there may be ſyſtems of morality called the Law of Nations, of very different characters, and that if we truſt to the Law of Nature alone for a guide, we may be diſappointed in expecting to find an uniformity of ſentiment in the nations to whom we may addreſs ourſelves. And hence it is neceſſary not only that we ſhould have ſomething more fixed and definite as the foundation of the Law of Nations, but that we ſhould content ourſelves with compoſing a code for thoſe nations alone, who think as we do concerning that foundation.

This ſomething more fixed and definite, I conceive to be RELIGION: not *natural*, (for that is nearly as vague as the *Applications* of Natural Law itſelf) but *revealed*. For however floating the ideas of mankind may be concerning natural duty, the precepts of ſuch a religion muſt at leaſt ſuperinduce CERTAINTY among thoſe who believe in it.

Hence therefore it is, *in addition* to the Law of Nature, not with a view to reject it, that I hold religion, and the moral

moral ſyſtem engraſted upon it, to be the trueſt foundation for that code of morality which we call the Law of Nations.

I am the more anxious that I ſhould be ſo underſtood, becauſe I have unfortunately been thought to mean things very different, by ſome profeſſional friends, in whoſe judgment and acquirements I have no inconſiderable confidence. Upon viewing (before the work was completed,) the diſcuſſion contained in the ſecond chapter, they contended, that although I had ſtated the argument in favour of the *uniformity* of the Law of Nature, with fairneſs againſt myſelf, and although I profeſſed to confine my objections ſolely to the uniformity of *the application* of that Law; yet that my own argument went to its utter annihilation; and that whatever I might think, I had yet made out Man, *independant of Chriſtianity*, to be a creature about whoſe nature we had no lights at all, and who had a *right* to conſider his own will and appetite as his law.

Whether I have done ſo or not; whether I have not endeavoured cautiouſly to extend my meaning ſolely to *the application* of Natural Law to certain *definite* and *poſitive* duties, the reader is now to judge; but at any rate, ſhould my mode of treating the ſubject be thought to go to ſo great a length, I am not ſorry here to have an opportunity of giving a key to the argument, as far as my own intention reſpecting it, is concerned. In the diſcuſſion to which I allude, there were not wanting many perſons in whoſe knowledge I alſo confide, who differed in toto from thoſe above-mentioned; and on a ſubject which is of confeſſed hardneſs, and has divided the opinions of men far above me in every ſort of attainment, I cannot but expect much difference of ſentiment upon almoſt every thing that can be ſaid of it. But the demonſtration of the poſſibility to miſtake my own meaning upon the matter, makes it deſirable for me to have thus an opportunity of doing juſtice to myſelf. At the ſame time it is right to mention, that the objections that were actually made, though oppoſed, as I obſerved, by others, induced me to make a little, and but a little alteration in the chapter, after it was printed. It is confined ſolely to the endeavour to tie down the meaning of the argument, ſo as that it cannot now, I believe, be miſunderſtood.

With reſpect to the poſitions themſelves, I can have nothing here to add. They have for ever divided the opinions of mankind; and I pretend not therefore to the power

power of ſhaking the ſentiments of men who may have conſidered, and made up their minds upon the ſubject. All I hope from theſe, is the acknowledgement that I have ſtated the argument in favour of uniformity with perſpicuity and fairneſs. Of the anſwers to that argument, thoſe to whom the ſubject may be new, will now judge for themſelves.

The ſecond chapter having endeavoured to deſtroy the idea of uniformity and certainty in the opinions concerning *the application* of Natural Law to the duties of human life; I proceed in the third to enquire what it is that will produce greater certainty, at leaſt among particular claſſes of nations; and having ſhewn it to be the religious and moral ſyſtems of thoſe nations, I reſt the foundation of their Law upon thoſe religious and moral ſyſtems. I afterwards endeavour to prove, that CHRISTIANITY is the only *certain* foundation for that code which is obſerved by Chriſtian, in other words, by European nations.

Theſe three chapters are therefore to be taken together, before we can complete the account of the foundation and conſtruction of the Law of Nations in Europe. The fourth chapter is a mere ramification of the argument in the other three, which goes to prove that the Law of Nations is not to be conſidered as the Law of the World, but only of particular claſſes of Nations, united together by ſimilar religious and moral ſyſtems, and influenced by particular local inſtitutions. The fifth is an attempt to point out how different *claſſes* of nations may be diſtinguiſhed: and with this finiſhes what may be conſidered as the firſt part of the enquiry.

Of the ſecond we have already ſaid much. It is needleſs to add that it compriſes the hiſtorical part of the work, and is to be conſidered as the neceſſary conſequence and proof of the firſt. In this I have begun as early as any certain documents would permit me, nor will any reader perhaps be wiſhful to go deeper into the antiquities of Europe than the commencement of the Empire of the Greeks and Romans. Dr. *Falconer* will excuſe me for having preſumed to differ from him in the endeavour to account for the oppoſition of the maxims concerning their treatment of priſoners, which were obſerved by thoſe nations. The ſubject was not before him except collaterally; but I neither wiſh, nor mean to challenge his attention to a part of my enquiries,

ries, on which I have to confeſs that I have not uſed much labour.

The account of the *Scandinavian* Law of Nations, is one of the ſtrongeſt proofs of our theory. The effect of their military religion, if I may ſo call it, upon their duties towards their neighbours, was palpable and violent: the regularity and order of the world were by them annihilated: and from the time of their eſtabliſhment upon the ruins of the Roman Empire, the hiſtory of the Law may be almoſt ſaid to re-commence. It will be needleſs to point out to the reader the great uſe which in this part of my work I have made of the Northern Antiquities compiled by Mr. Mallet; whoſe ſelections are not more inſtructive as a picture of the mind of man, than they are pregnant with genius as beautiful poems.

In the courſe of this *Hiſtorical* part of the enquiry, I have, I fear, purſued but little method. Wherever I have found events of the ſame kind crowding after one another in a perpetual ſtream. I have followed them in a mere plain relation; nor have I aimed at farther order in the recital, than to endeavour to claſs facts of the ſame character together. Where, however, I have found a period in which new and ſtriking changes in the law preſent themſelves to notice, and the conduct of nations proceeds upon principles unknown before; I have then ſtopped the current of the hiſtory, and digreſſed into a critical enquiry concerning them. Thus the eighth, ninth, and tenth chapters, are a mere ſeries of events; the twelfth, thirteenth, fourteenth, fifteenth, and ſixteenth, form ſo many critical diſquiſitions concerning the influence of certain particular points, which gave a new character to the maxims of Europe. The ſeventeenth Chapter reſumes the thread of the hiſtory chronologically, with this new character accounted for, (as far as it lay within my ability to account for it,) and continues it to the ſeventeenth century, beyond which I meant not to extend it.

Why I have fixed upon this period as the cloſe of the Treatiſe, is to be explained, partly by the conſideration that the law has from that time been nearly ſtationary; but chiefly becauſe it was the age of GROTIUS, to whoſe Treatiſe little can be added, and from whom on any point it would be almoſt in vain to differ. Before his time the true principles of the Law of Nations were ſcarcely known. He broke ground, as it were, for a new cultivation; but he

he did it with ſuch ability, that the plans which he traced, and the method which he introduced have ſcarcely been altered, and remain to this day the proofs of a ſkill which was conſummate.

By his exertions the law was new modelled, and the reaſons for our duty as practiſed at this day, were either abſolutely ſtarted for the firſt time, or marſhalled in better order than they had ever yet been before. Beyond the Treatiſe therefore DE JURE BELLI ET PACIS, it was ſcarcely neceſſary to go, except to mention the few others that have attained to the honour of conſtituting, in conjunction with it, the codes of the duties of nations as obſerved at preſent. The ſtate of the law as a ſcience, immediately previous to the publication of this incomparable work; a very ſlight account of its author, and its progreſs, together with the reaſons which gave birth to the works of PUFFENDORF and VATTEL, finally cloſe the preſent Enquiry.

From this account therefore of the following Treatiſe, it will be ſeen that it pretends not to lay down what the law now is, but merely endeavours to point out what it *has been*. It may be ſaid to be the hiſtory of former opinions, and does not therefore aſſume any thing like a legiſlative tone. I ſhall be too happy if, humble as the deſign confeſſedly is, it may be deemed to have derived the ſmalleſt merit from the manner of its execution; and I ſhall be more than paid, if it ever arrives at the rank of being conſidered as an elementary book, for thoſe who come new to the ſtudy of the ſubject.

I have a little, and a very little to add concerning the execution of the work. The reader will no doubt obſerve that I have not been ſparing in quotations, both in the body of the Treatiſe, and in the Notes. I am aware myſelf, how this interrupts the attention, and particularly how it interferes with uniformity by the neceſſary change of ſtyle! But in an enquiry of this kind it was perhaps unavoidable. Many parts of it are purely critical, and therefore argumentative; and in theſe caſes we know how little an author's word can, or ought to be taken. I mean not to ſay that he would wilfully declare what he does not believe, or any thing of which he does not *think* himſelf certain; but ſuch is the conſtitution of our natures, that we are liable to be led away by a favourite ſyſtem, and often to be deceived

ceived by a particular bent of mind. Where this therefore is poſſible, it becomes the abſolute, the bounden duty of the author, to ſet before his reader the ſources of his information: and, if he argues from caſes of authorities, to ſtate them in the very ſame ſimplicity and amplitude, under which they appeared to *him*. This has often ſeemed ſo neceſſary to various writers, that they have generally ſubjoined at the end of their works, *Appendixes*, or Collections of what they call *proofs* and *illuſtrations*, which thoſe who read for mere amuſement, have as generally neglected. But as I profeſs not to write for thoſe who read for mere amuſement, I have had no ſcruple in interweaving theſe proofs and illuſtrations ſo cloſely with the body of the work, that the one is made to depend upon the other for its very connection and uniformity. And I have choſen this mode the rather, becauſe, as I pretend to no attractions of arrangement or ſtyle, I am ſenſible that the merit (if any) of the following pages, muſt depend ſimply upon the faithfulneſs and accuracy with which authorities are quoted. I am therefore not deterred by the fear, (ſo common I have obſerved, with many writers) of interrupting the courſe of the narrative, or of diverting the reader's attention. I know not indeed if I am right, but I have long thought that the art of bringing plain and authentic documents into a clear point of view, ſo as to affirm or deny a thing, or to prove that it cannot be either affirmed or denied, is the great merit of hiſtorical or of argumentative writing. Too great an attention to the decorations of language, may often lead us far away from this true point. It may pleaſe, but without the other it cannot fill the mind; it often leads to error, and is at beſt but meretricious.

This therefore is another object to which I have ſhaped my exertions; and whatever may be my opinion concerning a point of doctrine, or a particular tranſaction, if I may be thought to have ſtated them with clearneſs, and ſupported them with ſufficient authorities, it is all the praiſe I can expect, ſince it is all to which I have aſpired.

In the inveſtigation of certain matters, I have ventured to quit the beaten path, and to differ from authorities whoſe deſerved reputation would overwhelm me, did I not feel well ſupported by illuſtrious auxiliaries. Had I therefore nothing but myſelf to oppoſe to them, I ſhould not have dared to have ſallied forth from obſcurity. But being thus

ſupported,

ſupported, I have without the wiſh, and at the ſame time without the dread of provoking controverſy, attempted to ſet forth the grounds for my opinions. What I allude to, are, amongſt others, the queſtions concerning the difference of treatment experienced by Greek and Roman priſoners; the privilege of private war in the antient Barons; the *Sovereignty* of the Hanſeatic League; the nature of the Imperial Dignity; the exemption of Ambaſſadors from the juriſdiction of the criminal Courts of Law in England; and the caſe of Queen Mary of Scotland! It is with very great diffidence that a young profeſſor of the ſcience of law, can pretend to withold his aſſent on theſe points from whatever his ſuperiors have aſſerted before him. Why he has done ſo, he has endeavoured with all his ability to explain, and the public will judge, I hope, with their uſual candour.

Throughout the whole I have to lament the total want of aſſiſtance from men of experience and authority. The work which is now preſented to the world, is in fact the mere lucubration of a private perſon, left entirely to himſelf to collect his materials, to ſpeculate, and to decide. At the ſame time, the ſole reaſon for this perhaps, was his fear of treſpaſſing upon the time of ſuch men, when it might be more profitably employed for themſelves and for their country: Since however irkſome it muſt always be to intrude our works upon others for correction, the well-known liberality of the learned profeſſions deprives the intruſion of the greater part of its terrors.

One thing more before I have done. In the courſe of the following pages, there will be found ſome few alluſions to the late tranſactions of the French nation. In all that I have ſaid concerning them, I claim to be conſidered as a man arguing without prejudice, partiality, or reſentment. I have not gone out of my way either to meet, or to avoid the ſubject; and on all occaſions wherein I mention them, I profeſs to have taken them up ſimply as the beſt illuſtrations I could find for the argument I might have in hand. And, as in one place I particularly obſerve, all that I have ſaid of them, may be ſo ſaid, when we are in profound peace with them, or at ſome future time, when the names of France and England, their mutual rivalry, their hatred, or their contempt, will be only known in the relations of Hiſtory. At the ſame time it is in fairneſs to be remarked, that the conduct of this nation is now *ſomewhat* mended,

and

and that the points moſt complained of were the effects of the influence of a mercileſs tyrant, or of dark minded ruffians who have already, moſt of them, met their reward.

And now I will releaſe both the reader and myſelf, from a diſcuſſion which I feel to be growing but too long. The hopes and anxieties of a young author committing himſelf for the firſt time to the public, whoſe praiſe or whoſe cenſure, he has not hitherto been even in the way to court or to fear; will be my excuſe if I have treſpaſſed too much in this prefatory diſcourſe. I cannot conclude without obſerving, that whatever may be the fate of the main deſign; whether it be received with favour, or rejected with contempt, I have this ſound conſolation: that my intention has been to do good to my fellows in that province for which by inclination or ſtudy I am beſt fitted. To endeavour after this is the duty of all mankind, and if the work fails, the glory of the attempt may perhaps alleviate the diſgrace of the fall.

Inner Temple,
March 20th, 1795.

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THE FOUNDATION AND HISTORY OF THE LAW OF NATIONS IN EUROPE

CHAP. I.

WHAT THE LAW OF NATIONS IS.

IF we look through the hiſtory of Man, we ſhall ſcarcely be able to find an inſtance of two or three of the ſpecies being gathered together into ſociety, without the obſervance of ſome Law.

The neceſſity for Law in general, drawn from the nature of mankind, and their analogy with other parts of the Creation; if not a ſelf-evident truth, has been ſo well demonſtrated by a number of reſpectable writers, that it would be unneceſſary to give the diſcuſſion a place in this work. But the *foundation and ſtructure* of Law; particularly of that part of it which we propoſe to ourſelves as a ſubject of enquiry; are queſtions about which there has been ſo much difference of opinion, but which it is yet ſo

eſſential to underſtand with preciſion, that it will be right to examine them with care and attention.

The Sum of Mankind may be ſaid to be compoſed of independent Nations, Families, or Individuals; and the laws which govern them may be viewed under two relations; either as they concern the *interior* of thoſe nations or families, to be obſerved by their different component members; or as they concern them in their *exterior*; that is, in their conduct towards one another in their collective capacity; not as *individuals*, but as *Nations*.

The firſt of theſe we call the CIVIL or MUNICIPAL LAW; as prevailing in a particular ſtate, city, or body corporate; the laſt we call the Law of Nations; as prevailing among the different nations which, together, make up the whole of the world.

The difference between theſe two laws is remarkable.

The one, whether it takes its riſe from the will of each individual, ſignified in formal convention to each other; or whether it proceeds from mere cuſtom, the date and origin of which no man can tell; has always ſome common *Sovereign Tribunal* to expound its meaning and enforce its decrees. The other has no tribunal whatever; no judge to appeal to but the reſt of mankind.

The conſequence is ſuch as might naturally be expected; the one is for the moſt part, well underſtood, and uniform in its operations; the other is often unſettled in its principles, and as to its operations, generally uncertain.

To ſettle therefore, as far as a thing ſo fluctuating will permit, the true *foundation* of this remarkable law; what it is that renders it binding upon mankind; the changes to which it is liable; and the cauſes of thoſe

thoſe changes; is the ultimate object of the work before us. To enquire into its form and appearance, is the immediate ſcope of the preſent chapter. The ſubject is by no means without difficulty, notwithſtanding the volumes that have been written upon it; and the queſtion, What conſtitutes the Law of Nations, or how it is that it obtains? has been as differently anſwered, as it has been frequently put. Upon the whole however, the great points of difference concerning the mode of its ſtructure, ſeem to turn upon this; whether the Law of Nations is merely the law of *nature* as it concerns man, *and nothing more*; or whether it is not compoſed of certain *poſitive inſtitutions* founded upon conſent.

The lawyers and philoſophers of antiquity; the oracles of the Digeſt; and in modern times, *Hobbs*, *Puffendorf*, *Burlemaqui* and others, (*a*) ſupport the firſt opinion. *Suarez*, *Grotius*, *Huber*, *Bynkerſhoek* and in general the more recent authors, declare for the laſt.

The manner in which the firſt ſet of writers account for their ſentiments, is by erecting that famous theory, by which man in his origin is conſidered in a ſtate of the moſt ſavage independence; an inhabitant of woods like the beaſts of the earth; like them the poſſeſſors of a ſolitary den, and like them, attending to no calls but thoſe of appetite.

This uncouth, but intereſting picture aroſe firſt perhaps in the imaginations of the poets, (not improbably of thoſe who united legiſlation with poetry,) and from them was eagerly adopted into more regular ſyſtems of juriſprudence. Accordingly, no mode of expounding the ſpirit of laws and government, has been more common than that which traces every thing up to the creation of man; or, in other words,

(*a*) See much learning upon this in Taylor's Civil Law, from pa. 99 to 132. quarto edition.

to Man, as it is called in a *State* of *Nature*. This Theory, though often ſtarted, and beautifully amplified by the antient Poets, (*b*) ſeems firſt to have been thought of *as the foundation of a Syſtem of Law*, by *Hobbs*, in his famous book called the Leviathan, in which there is ſo much to admire, and ſo much to condemn.—It was adopted, and conſiderably enlarged by *Puffendorf*, and inſtantly approved of by writers without number. The reſult of their ſpeculations is, that man in ſuch a ſtate, owing obedience to none, and having no poſitive law to controul him, truſts for the direction of his conduct to nature alone: The influence which ſhe has over him, and the motives which, diſtinct from divine or human inſtitutions, impel him to forbear from, or to perform any particular action, are called the *Laws* of *Nature*; (*c*) and what ever number of men there may be within the ſphere of one another's intercourſe, their conduct towards each other, (while thus independent of civil bonds,) proceeds ſolely under the government of theſe laws.

When, however, civil ſociety came at laſt to be inſtituted, men divided themſelves into ſeperate communities, and agreed to be governed by particular poſitive inſtitutions, in which many of the rights conferred by mere nature were given up, for the better preſervation of the reſt: but the Communities in their relations with one another, having given up none of theſe rights, they ſtill continue to be governed in all their public tranſactions, as the individuals that compoſed them originally were; and thus the *communities* of the world *remain* in a ſtate of nature with

(*b*) Particularly Lucretius. Lib. 5.

(*c*) Enimvero utrobique intellegimus propoſitiones quaſdam immutabilis veritatis quæ actiones voluntarias circa bonorum electionem, malorumque fugam dirigunt, ac obligationem ad actus externos inducunt; etiam citra leges civiles, et ſepoſita conſideratione pactorum regimen conſtituentium.

Cumberland De leg. Nat. 6. 1.

reſpect

reſpect to one another, and of courſe can follow no other law but the law of nature. Hence, ſays Hobbs, the law of nature admits of two diviſions: Firſt, as it is applicable to men as *individuals*; ſecondly, as it regards them as collected into Nations. The laſt is what is called the Law of Nations, which is thus nothing more than the Law of Nature. (*d*)

Such is the train of reaſoning adopted by thoſe who contend that theſe two laws are exactly the ſame with one another; and the favourers of this ſyſtem are ſo numerous, and have exiſted in times ſo ancient, that it would ſeem almoſt preſumptuous to have any doubt of its ſoundneſs. The opinions of the authors of the *Digeſt* and the *Inſtitutes*, are all founded upon it; and nothing is more common than to uſe the two laws in ſenſes nearly ſynonimous. (*e*)

"Law," ſays Dr. *Taylor*, "muſt be either *natural* "or *inſtituted*, viz. ſuch as *God preſcribes in the voice* "*of reaſon*, or ſuch as *man appoints by his civil ſanc-* "*tion*: to which muſt we refer the Law of Nations? "To the law of nature doubtleſs, of which it is a "part: for if we conſider its origin, it is the law of "nature; if the object or application of it, it is the

(*d*) De Cive, Cap. 14. Sec. 4. "Rurſus Lex naturalis dividi "poteſt in naturalem *hominum*, quæ ſola obtinuit dici Lex natu- "ræ; et naturalem *Civitatum*, quæ dici poteſt *lex* gentium, vul- "go autem *Jus* Gentium appellatur. Præcepta utriuſque eadem "ſunt." &c. &c.

So alſo Burlemaqui "Il faut donc dire que le Droit des Gens, "proprement ainſi nommé et conſideré comme une loi qui emane, "d'un Superieur, n'eſt autre choſe que le *droit naturel* lui meme, "non aux hommes, mais aux Peuples," &c.

Principes du droit naturel, 2. 6. 5.

(*e*) Quod *naturalis Ratio* inter Omnes homines conſtituit, id apud omnes peræque cuſtoditur, vocaturque *Jus Gentium*. quaſi quo jure *omnes gentes* utantur. Dig. 1. 2. 1.

Jure Naturali, quod appellatur *Jus Gentium*. J. 1. 2. 1.

Gaius alſo, De acquirendo rerum dominio, holds that we acquire Property in the Birds and Beaſts which we take *by the Law of Nations*; obſerving that the *Jus Gentium*, cum *ipſo genere humano* proditum eſt. Dig. 41. 1. 1.

"Law

" Law of Nations. It is ſtill the dictate of right " reaſon, applied to the wants of ſocieties. So that " what uſed to be called *Jus Naturæ*, becomes *Jus* " *Gentium.*" (*f*)

Spacious, however, as this reaſoning appears, and ſound as it may be allowed to be, as far as it goes; it is probably not difficult to demonſtrate that ſomething more is neceſſary than a ſimple view of the Law of Nature, before we conſider ourſelves obliged to yield obedience as to a *Law*, to thoſe cuſtoms which govern the intercourſe of Nations.

Whoever caſts his eye over the innumerable forms and particularities, which the ſtates of the world conſider themſelves bound to obſerve in certain ſituations; the *changes* in thoſe forms; the partial or the general obſervance of them; and the varieties of conduct which evidently ſpring from *poſitive Agreement*; can hardly be led to a firm belief that the Law of *Nature* alone, points them out for our regulation. The Law of Nature is conſidered beſides, as *immutable*; *impreſcriptible*; and exiſting through all time; (*g*) (a point which we ſhall ſoon have occaſion to conſider more at large;) but the difference between the Law of Nations *now*, from what it *has been*, muſt at once overthrow the poſition. For example; it was part of the Law of Nations formerly, to admit of the reduction of captives to ſlavery; and that upon the ſuppoſed right of putting them to death: Yet a nation which in theſe times ſhould venture upon ſuch acts of barbarity, would not fail to draw down upon it, the execration, and poſſibly the perpetual war of its neighbours. This conduct however is juſtified according to the *law* of *nature*, by all juriſprudential writers. To conſider it therefore as a breach of the

(*f*) Taylor's Civil Law, p. 128.
(*g*) Taylor's Civil Law, 129.

law

law of *nations*; or to hold it out as matter of deteſtation, becauſe it is a breach of them; can only be founded upon the ſuppoſition that the latter law is very different from the former. It has indeed been well ſaid by *Puffendorf*, that the right to do any particular thing, impoſes upon us not the neceſſity for doing it; and hence it may be argued that this abſtaining from the execution of priſoners in War, is ſtill agreeable to the Law of Nature, though puſhed to its extent, that law might permit us to do much more. But if we abſtain from this *full* exerciſe of the right, and that, in conſequence of the *law of nations*, which would be ſhamefully broken if we did not; it ſhews that the two laws are eſſentially different; and if the one may be ſaid to be only *leſs* in extent than the other; it is different, from the very circumſtance of its being *leſs*. (*h*)

How it came to be thus circumſcribed; how the full force of the liberty enjoyed in a ſtate of nature, came to be oppoſed by certain Inſtitutions which are, or ought to be, invariably obſerved; are queſtions not ſo eaſily anſwered, except by acknowledging that Man has appointed this circumſcription by his *Civil Sanction*; which Dr. *Taylor*, in the paſſage above cited, allows to be not *Natural* but *Inſtituted* Law.

In a State of Nature; that is, acting under the Law of Nature alone; if it be neceſſary to make war, war is made without any notice but the very act of hoſtility. Among Nations, (though doubts are en-

(*h*) Vide Bynkerſhoek. Queſt. Juris Pub. "Sed mores Gentium qui olim *fuerunt* et nunc ſunt, ſollicitæ diſtinguendum "eſt *Moribus cenſetur, precipua pars Juris Gentium.*"

Hence the opinion of Grotius, reaſoning on the Inviolability of Ambaſſadors. "Bonum et æquum, id eſt merum *Naturæ Jus* "patitur pœnas exigi, ubi reperitur qui deliquit; at *Jus Gentium* "legatos, et qui his ſimilies fide publica veniunt, excipit. Quare "ut rei ſiant Legati. contra Jus eſt Gentium, *Quo vetari multa* "*ſolent, quæ Jus Naturæ permittet.*" De J. B. et P. 2. 18. 4. 3.

tertained

tertained by many on the ſoundneſs of the point,) thoſe who make war by ſudden ravages, are conſidered as *Robbers*, and may be puniſhed as ſuch; and accordingly, from the oldeſt time, a ſolemn form which ſtamps a State with the terrible character of *Enemy*, has been demed neceſſary before it can proceed to acts of *legitimate* War. In a State of Nature, if once in conſequence of juſt hoſtility, we are permitted to kill an Enemy; it ſhould ſeem that the manner of doing it, was indifferent; under the Law of Nations however, nothing is more expreſsly forbidden than the uſe of *poiſoned* arms. In a State of Nature, it would appear, that whoever aſſiſts my enemy, though only to a certain point; by the very act of aſſiſtance, becomes my enemy alſo: and even under the law of nations in *other* times, ſuch doctrine was held reaſonable; In the days of modern refinement however, it is not conſidered as a breach of thoſe laws, nor a ſufficient cauſe for War, to lend aid to one State againſt another, when bound to do ſo by *Treaty*. (*i*)

In reaſoning upon many of theſe cuſtoms, it would poſſibly be a taſk not more unneceſſary than vain, to endeavour to trace them up to the law of nature. In many points that law abſolutely withholds its deciſion; and leaves us often to chance, where precedent is wanting, to determine upon a rule by which millions perhaps are to be governed. For example; on the diſcovery of uninhabited lands; though the *law* of *nature* may preſcribe ſome act of poſſeſſion to thoſe who wiſh to eſtabliſh themſelves there; it cannot poſſibly determine what ſhall be the particular form to conſtitute a legal property, in the eyes of the reſt of the world. That form, it is left abſolutely to the Law of Nations to ſettle; and it may be any trivial

(*i*) See more upon this point, when we come to the Influence of Treaties on the Law of Nations.

thing

thing which chance, or accident, or caprice may point out. Not only this, but immenſe tracts of Land, which have never even been ſeen; Seas and Rivers that have never been explored, are often claimed to the excluſion of others, merely on account of a partial diſcovery of them. Of the ſame nature with this are a vaſt number of *Ceremonies*, and maxims, all of them forming part of the *Law* of *Nations*; but wholly independent of the *Law* of *Nature*; as, the particular forms of declaring War; the diſtinguiſhing marks of Heralds, and Flags of Truce, in order to ſhew the pacific intentions of thoſe who bear them; the precedency of different nations according to the forms of their government, whether Imperial, Monarchical, or Republican; the Ceremonies of Courts; the Credit attached to certain documents ſuppoſed to confer high privileges on thoſe who are furniſhed with them; (as the Credentials of Ambaſſadors;) the great immunities of thoſe Miniſters, (not abſolutely neceſſary for the ſucceſs of their miſſion, but) agreed upon by different nations; the proportion of *Salvage* allowed to a nation that recaptures the property of another, with whom there is no Treaty, from a common enemy; all theſe, are ſurely the effect of *Convention* (*k*) of ſome ſort or other; and by no means pointed out by natural right. "*Natural* "*Law*," ſays *Bynkerſhoek*, "eſtabliſhes neither diſ- "tinction of perſons, nor property, nor civil govern- "ment; it is the *Law* of *Nations* which has invented "theſe diſtinctions, and renders all thoſe who happen "to be within the territory of a State, ſubject to the

(*k*) "Ceſt le *conſentement* de toutes les Nations de la Terre qui "fait ce qu'on appella le droit des Gens. Il tient le milieu entre "le droit Naturel et le droit Civil; et eſt d'autant plus conſidera- "ble que le dernier, qu'il ne peut eſtre changé ni alteré, ſinon du "meſme *Conſentement* unanime de tous les peuples."

Wicquef. de l'Ambaſſadeur. l. 1. 27.

" juriſdiction of that State. *Reaſon* and *Cuſtom* " are the only Baſes of the *Law* of *Nations.*" (*l*)

Of this opinion alſo, and in all its extent, ſeems to have been a writer of great perſpicuity and comprehenſion of mind, though his writings are ſeldom explored. I mean Franciſco SUAREZ, a famous Jeſuit of Grenada, in the ſixteenth century, and long time profeſſor of divinity in the Univerſity of Conimbro.

I ſhall make no apology to the learned Reader for ſetting before him the following of his poſitions.

Natural law, differs from other laws in this; that other laws, *conſtitute of themſelves* the turpitude or honeſty of the things they prohibit or inculcate, while Natural law, always *pre-ſuppoſes* in the act or ſubject, the turpitude which it prohibits and the honeſty which it inculcates; and therefore we uſually ſay that a thing is forbidden by this law, *becauſe* it is bad, or commanded, *becauſe* it is good. (*m*)

Now it is to be believed, that the Law of *Nations* does not command or prohibit things becauſe they are *intrinſically* good, or *intrinſically bad*; for ſuch things belong properly to *Natural* Law; and in this ſenſe therefore the Law of Nations is not comprehended in Natural law. (*n*)

(*l*) Bynk. de Foro Leg. Cap. 24.

(*m*) Vide Fr. Suarez. De Leg. ac Deo Legiſlat. L. 2. C. 7. S. 1. Imo in hoc differt lex naturalis ab aliis legibus, quod aliæ *faciunt* eſſe malum quod prohibent; et neceſſarium vel honeſtum quod præcipiunt; hæc vero *ſuppmit* in *actu* ſeu *objectu*, honeſtatem quam præcipiat, vel turpitudinem quam prohibeat; et ideo dici ſolet per hanc legem prohiberi aliquid quia malum, vel præcipi quia bonum.

See alſo other opinions to this purpoſe. Puffend. Droit des Gent. L. 2. Ch. 3. S. 4.

(*n*) Concludendum igitur cenſeo, *Jus Gentium*, non præcipere aliquid tanquam ex ſe neceſſarium ad honeſtatem, nec prohibere aliquid quod per ſe et *intrinſece* malum eſt, vel abſolute, vel tali ſuppoſito Statu et conditione rerum; ſed hæc omnia pertinere ad Jus *Naturale*, ac Subinde in hoc ſenſu, Jus *Gentium*, non comprehendi Sub jure naturali. Id. 2. 17.

The

The Law of Nations differs in the firſt place and that very particularly, from *natural* law; in ſo far as it contains certain *Poſitive* precepts, the neceſſity of which it does not infer *ſolely* from the *nature* of the thing inculcated, by an inference drawn from *natural* principles; and as we have ſhewn that every thing that is thus inferred, muſt be attributed to *natural* law; ſome other cauſe for this neceſſity muſt be ſought for by the law of Nations.

It differs in the ſecond place, becauſe it cannot be ſo *immutable*, as the law of *nature*; for *immutability* takes its origin from Neceſſity.

Hence laſtly, it follows; that even in the things in which the two laws appear to agree, they are not exactly, and every way ſimilar. (*o*)

Such is the opinion of the Philoſopher of Grenada, and he adds to it a ſlight enumeration of thoſe points which form the ſubject of the law of nations, but on which nothing is decided by *natural* law. Moſt of them have been mentioned above, and among them he particularly takes notice of the privileges of Ambaſſadors (*p*), and the neceſſity under which the world is ſuppoſed to be by the law of *nations*, and not the law of *nature*, to cultivate commerce. (*q*)

(*o*) Differt autem primo ac præcipue *Jus Gentium* a Jure *Naturali*: Quia quatenus continet præcepta affirmativa, non infert *neceſſitatem* rei præceptæ, ex ſola rei natura per evidentem illationem ex principiis naturalibus; quia quicquid hujuſmodi eſt, *naturale* eſt ut oſtendimus: unde neceſſe eſt, ut aliunde oriatur talis neceſſitas, &c.

Secundo differant conſequentur, quia Jus *Gentium*, non poteſt eſſe tam *immutabile* ſicut *naturale*, quia Immutabilitas ex neceſſitate oritur.

Tertio hinc fit, ut etiam in his, in quibus hæc jura convenire videntur, non habeant omnimodæ ſimilitudinem.—Id. L. 2. C. 19. 3.

(*p*) Id. 2. 19. 6.

(*q*) Jus naturale *per ſe*, ad hoc (*Commercium.*) non obligat; potuiſſet enim una Reſpub. per ſe vivere, et nolle Commercium cum alia, etiamſi non eſſet inimicitia.—L. 2. 19. 7.

Thus

Thus much then with reſpect to thoſe who favour the ſuppoſition of *Hobbs* and *Puffendorf*, that Man roſe ſuddenly from the Earth; or dropped from the clouds, with all his Faculties perfect, and beheld other beings around him, of the ſame ſpecies, and in the ſame ſituation.

But to thoſe who lend their belief to the tradition handed down to us by our Fathers, in the moſt complete as well as the moſt venerable monument of Antiquity extant in the world; little reflection is wanting to ſhew, that reaſonable doubts may be entertained, whether mankind ever exiſted in any ſtate where certain cuſtoms were not known and complied with; and if ſo, the law of *nations* muſt, even at all times, have been different from the mere law of *nature*.

The hiſtory and origin of Government and Civil Society, have been topics, ſo often handled, and the ſubjects of ſo much learned and ingenious diſcuſſion, that it would be little neceſſary to touch upon them here. But if we believe in the MOSAIC TRADITION, and give our aſſent to that wonderful force of corroborative circumſtances which are ſupplied by the hiſtory and the face of the Earth; we can hardly imagine the accounts of the State of *nature* above mentioned, to be any thing more than the wild images of Poetry, or at beſt an invention for the more convenient deduction of certain reaſonings on Law and Right.

Upon the ſuppoſition then that the world was peopled by a ſingle pair, and of courſe that every man except the firſt, muſt have gradually advanced through a long and weak infancy, to the full uſe of his faculties in body and mind; it is hardly poſſible not to believe, that Government and Society (of what ſort is not here the enquiry) are as old as the world itſelf.—And however ſoon the emigration of children from their fathers, or of particular families from their community, may have taken place; ſtill, the exiſtence

ence of certain cuſtoms and ceremonies, and even of rules and laws, muſt be ſuppoſed coeval, or nearly coeval, with the exiſtence of mankind.

This latter conſideration, is what I do not recollect to have ſeen in any of thoſe theories which make a difference between the laws of nations and of nature; nor is it offered as concluſive argument, but merely as ſtrong collateral evidence, the weight of which muſt in every man's mind depend upon the inclination of his opinion with reſpect to the manner in which the world was peopled.

So ſtrong was the impreſſion with GROTIUS, that the law of nations was the *cuſtom* of nations, excluſive of the dictates of nature; that a writer of great weight (*r*) has imagined him to have puſhed this theory too far, and to have rejected the interpoſition of natural law, more than was reaſonable.—And indeed in the following ſentiments, we may ſuppoſe him to mean that the States of the world form one great federal community, which has actually determined upon one common, definite Code of Laws for its government.

"As the laws of every State," ſays he, have a "view to the particular intereſt of that State; So "among the States of the world, or the greater num- "ber of them, certain laws may be agreed upon *(ex "conſenſu)* which have a view to the intereſt, not of "ſingle Communities, but of the great whole; and "this is what is called the law of nations as often as "we diſtinguiſh it from the law of nature."

Again, "whenever we obſerve a ſettled maxim "put in practice by numbers at different times and "places, we muſt attribute it to ſome univerſal cauſe; "which in the ſubject before us, can only be by mak- "ing it flow immediately from *natural* principles; or

(*r*) Vattel in pref.

"the

" the *common conſent* of the world. The one points " out what is the law of nature; the other what is the " law of nations; for it follows of courſe, that what " is not deducible at once by reaſon, from certain " fixed principles, and yet is univerſally obſerved; " muſt derive its force from *voluntary conſent*. I have " therefore been careful," continues he, " to diſtinguiſh " the law of nations from the law of nature, as well " as from the civil law." (*s*)

In this opinion, the Philoſopher of *Delft*, may be thought to have gone too far; ſince though there can be little doubt but that *Convention* enters into the compoſition of the law of nations; it can hardly be denied that there is much force in the oppoſite *Theory*; and though the tranſactions of nations are governed by cuſtom in a vaſt variety of points; yet *in the beginning*, and even now, *in affairs that are without precedent*, above all, in points of general duty and conduct, they can have nothing to follow but ſuch laws as individuals *not connected together in civil ſociety are bound to obſerve*. (*t*)

Steering therefore equally clear of the inaccuracy of the *Roman* Lawyers, and ſome modern authorities; and this opinion of *Grotius*, that the Law in queſtion is *Inſtituted* Law, and that alone; we ſhall not perhaps err much in inclining *for the preſent*, to the more recent Sentiment, that although the law of Nations is to look for its principles to the Law of Nature, and Sovereigns are to be governed in their general line of conduct, *and in all particular caſes that are new*, by the ſame principles as would govern independent individuals; Yet, that many cuſtoms have been adopted, and many maxims agreed upon, we are to look to *them*, in thoſe caſes where they preſent themſelves, for

(*s*) Prolegom. Sec. 17. 41. 42.

(*t*) What that law is, we ſhall enquire more at large in a future chapter.

the interpretation of the principles. (*u*) I ſay, *inclining for the preſent*, becauſe we mean hereafter to enter upon a full diſcuſſion of the Law of Nature, and to endeavour to ſettle more accurately than has hitherto been done, what we are to underſtand by it, and under what modifications, when we ſpeak of it as the foundation of the law of Nations.

Thus then the law of nations may be ſaid to be conſtructed in the ſame manner with various parts of other laws, which are not written, but derive their force abſolutely from Equity and Cuſtom, (*x*) of which, a very great proportion of the law of this realm, (ſurely far different from the *mere* law of nature) is an illuſtrious example.

There are indeed caſes perpetually happening, in which various modes of action preſent themſelves, all equally recommended by nature and reaſon; and in which, it is not of ſo much conſequence to determine upon any one of them from a thorough conviction of its ſuperiority; as that ſomething definite ſhall be determined upon. In theſe caſes, it is evident that if nature and reaſon recommend them all; the ſelection can be only made by the ſanction of *poſitive* law. The end is pointed out by the one; the means are adopted by the other; the principles are founded in *reaſon*; the application, is abſolute *inſtitution*; ſo that the whole together, form a compoſition of the laws of *nature*, and the laws of *man*. I have alledged," ſays *Bynkerſhoek*, (upon the Inviolability of Ambaſſadors) " whatever reaſon can adduce for or againſt the queſtion; we muſt now ſee what is

(*u*) In the ſame manner as (with us in England) it is an Act of Parliament which preſcribes the general terms of a law, but it is the Courts of Juſtice which are charged with its interpretation; and the Act, and the interpretation (in the caſes that have been actually decided) *taken together*, form the law.

(*x*) See Grot. de Jur. Bel. P. 1. 1. 14. 1.

really

really to be determined; what *Cuſtom will have ſettled will carry it without doubt;* ſince it is on *Cuſtom* that the law of nations is founded; (*y*) and indeed whatever may be the definition of this law, we muſt always return to this; that, that which reaſon dictates to the people of the world, and that which they *obſerve* in conſequence of a compariſon they make of the things which have happened, form the ſole law for thoſe who have no other to follow. If men only make uſe of their *reaſon*; reaſon will but *adviſe* certain things to be obſerved by them; which *being thus obſerved*, ſo as to become eſtabliſhed *Cuſtoms*, people are under a reciprocal obligation to comply with them, without which we cannot imagine either War, or Peace, or Alliances, or Embaſſies, or Commerce." (*z*)

Such is the language of one of the ableſt writers on this part of law, who ſaw clearly how different the modifications of certain Cuſtoms muſt render the mere law of nature. The ſentiments contained in the ſmall Treatiſe which he gave to the world, were ably developed by WOLF, (*a*) and put into more poliſhed form by VATTEL; from whom if we differ at all, it will only be in endeavouring to give ſomething more definite and binding even than this aſſemblage of the laws of *Nature* and the laws of Man, as the *real* foundation of the Law of Nations,

In this ſtage of the arguments, it may not be improper to take a view of an objection, whoſe force, if allowed, would overturn the whole of what has been ſaid. It is to be found at large (though it was thought of long before by Suarez,) (*b*) in Dr. *Taylor*'s learned Treatiſe on the Civil Law, in which he has occaſion to conſider the queſtions before us. The following is the Sum of his reaſoning.

(*y*) Bynkerſh. De For. Leg. C. 7.
(*z*) De For. Leg. C. 3.
(*a*) Jus Gentium.
(*b*) De Leg. ac Deo Leg. 2. 18.

The

The Law of Nature is divided into *abſolute* and *Hypothetical*. The one obliges *abſolutely, all perſons, at all times and in all places, for it is immutable*; the other only *conditionally*; that is, ſuppoſing ſuch and ſuch conditions to exiſt; which, if they do not exiſt, nothing is done. But if they are juſt and reaſonable in their own nature when they do come to exiſt, the obligation to obſerve them operates as ſtrongly, as the obligation of the Law of Nature did in its abſolute force. (*c*) This reaſoning is thus illuſtrated by Caſes.

The Law of Nature recommends the advantages of Society. When therefore Society is formed, and not before, *all the means of maintaining it*, and *all the conſequences that flow from it*, are as much the Law of Nature, that is, the *Law of Nature Hypothetical*, as the rules before it, were the rules of the *Law of Nature abſolute*. (*d*) So alſo with *Contracts*; the obſervance of which is not in conſequence of any *new* Law, but merely that an *eternal and neceſſary* Law, has now a Scene in which it may exert its operations. (*e*)

When writers then tell us of a *ſecondary* Law of Nations, which in many reſpects is totally different from the *primary one*; this is the true and natural obſervation upon that ſeeming diſagreement. If I am directed to cultivate Society, I find there can be none without a ſeparation of property; Property introduces diſputes; diſputes are the occaſion of war; war brings on Captivity; that again Slavery; till we come by the benefit of manumiſſion to the recovery of our *natural* Rights.

This ſcheme has *led people to imagine that the ſecondary law of nations was a kind of conventional, volun-*

(*c*) Taylor's Civ. Law. Quarto Edit. 129.
(*d*) Taylor's Civil Law. 129. (*e*) Id. 130.

tary law, diſtinct from the law of nature. But though the natural equality of mankind, and the admiſſion of Slavery; the community of goods, and the introduction of property; and many other cuſtoms compared with natural right, ſeem in oppoſition to one another; yet, if the rights and duties of this *new ſcene*, are not *incongruous* with the law of nature; what is called the *ſecondary* law of nations " has really no exiſtence; nor can that be ſaid to be " introduced by poſitive or arbitrary contracts, or by " voluntary confederacies, which is fairly the pre- " ſcription of right Reaſon." (*f*) Hence all the obligations which ariſe from what is called the *Jus Secondarium*, were virtually laid upon us before, but could never be known till ſomething called them forth. Thus *theft* is contrary to the *law of nature*, though it could not be known till after the inſtitution of *Property*; for the doctrine of " Alterum ne lædas" loſes no force; So that when the Civilians ſay that *Theft* is baſe in its *Nature*, they mean that *it would be ſo*, after *Property* was once introduced. (*g*)

To this reaſoning little can be anſwered; ſince if taken in one light, it cannot apply to the queſtion before us, and therefore requires no anſwer; if in another, it is every where contradicted by fact. If it means that men have really no view to rule and precedent in their conduct towards one another; it would be uſeleſs to endeavour to prove that they had, when rule and precedent every where preſent themſelves to notice. But if it means merely to trace *all* Laws up to their ſource and reaſon, and to aſſert that they are *Laws* of *Nature*, becauſe the na-

(*f*) Taylor's Civil Law. 139.

(*g*) Ib. 131. See alſo Suarez de Leg. ac Deo Legiſlat. L. 2. C. 18. Nam multa ſunt de jure naturali quæ non obligent, nec locum habent, niſi aliqua ſuppoſitione facta. Ut præceptum *non furandi*, non habet locum, niſi facta diviſione bonorum et dominiorum.

ture of man makes him propoſe ſome advantage to himſelf in *all* his conſtitutions; there can then be no queſtion between us. In that view of the ſubject, all the laws that ever exiſted, may be deemed laws of nature; and the laws of a particular State, a particular Diſtrict, nay even of a particular *Society* or *Club* of men, may be ſaid to be laws of nature, as well as the laws of nations: For they are all founded upon the natural inclination to uphold Society; they are the means of *maintaining it, and the conſequences that flow from it*, which to uſe the language of the argument are the laws of nature.

To thoſe however who do not regard the queſtion in this extenſive point of view, but merely enquire whether the particular form in which the principles of natural duty are applied, muſt not have the *civil ſanction* of men to ſtamp it with the authority of *law*; this reaſoning will appear, if not nugatory, at leaſt gratis dictum. (*h*)

As therefore the principles of all civil and municipal laws, muſt be founded in natural reaſon, but derive the form and manner in which they are brought into uſe, from *poſitive inſtitutions*; So alſo the law of nations muſt put in force the dictates of nature, in ſome *known mode* agreed upon by all who conform to them. The only difference is, that in the one caſe, it is individuals who are called upon to ſettle the mode; in the other, it is whole nations, acting through the organs of their govenments; that in the one, almoſt every thing that can exerciſe the judgment of an individual in his various relations, is ſettled for him by written law, or by precedent; while among States, (from their comparatively little

(*h*) It was Gibbon's judgment of Dr. Taylor's work, that it was of amuſing, though various reading; but could not be praiſed for philoſophical preciſion.

Dec. and Fal. Ch. 44. Note. 132.

intercourſe, and the want of a *common Sovereign*,) much is left without precedent, wavering, as accident, or whim, or the varying ideas of natural juſtice, may direct.

Upon the whole then, the account of the Law of Nations, is not greatly different from that of the *Municipal*, which by all writers is conſidered as *poſitive* law. For both the one and the other look for their principles to *Reaſon*; for their application, to regular *Inſtitution*; and hence a writer of the laſt age has ſaid, not improperly, that the Law of Nations holds the midway between civil law and the law of nature. (*i*) When however they come to be broken, the difference is far more ſerious. The breach of *municipal* law is attended only by the puniſhment of the offender; (the law remaining ſtill in force ſtrengthened perhaps by the very infraction:) the breach of the other, can only be remedied by the refuſal of thoſe who are injured to comply with it any longer, and the law itſelf is totally deſtroyed.

(*i*) Wicquefort de l'Ambaſſad. 1. 1. 27. Suarez alſo calls it medium inter naturale jus, et humanum, et priori extremo vicinius. L. 2. 6. 17.

CHAP. II.

OF THE OBLIGATION OF NATURAL LAW.

BUT a very material queſtion preſents itſelf now for diſcuſſion, which muſt be ſatisfactorily diſpoſed of before we can proceed farther. Although it may appear ſettled, that the Law of NATIONS conſiſts of the Law of NATURE, modified by the expreſs or the implied conſent of Nations; ſtill if it ſhould happen that the *particular* ſets of actions and offices which compoſe what is called the moral ſcience, and which are expreſsly ſaid to take their riſe and obligation from the Law of *Nature*, ſhould not always reſemble one another: If different philoſophers, proceeding as they think from this ſame Law, ſhould be found to have very different ideas of duty; and nations in conſequence have adopted in the ſame ſituations, very *different* modes of conduct: If this, I ſay, ſhould happen, we muſt I think be driven to confeſs, that the *law of nature* itſelf, is a very imperfect foundation for any Law which is ſuppoſed to be definite and certain; and which on account of that foundation, and that alone it is affirmed, is to govern *all the States of the World.*

A very able writer upon the ſubject of Laws, conceives the Law of Nations to depend upon the principle, "*that different nations ought to do as much good* "*to one another in peace, and as little harm as poſſible* "*in War, without prejudicing their real Intereſts.*" (*k*)

As a great fundamental principle, or out-line of the Law of Nations, I have no kind of doubt of the

(*k*) Monteſq. De l'Eſp. des Loix. l. 1. ch. 3.

foundneſs

ſoundneſs of this propoſition; but when we come to *a detailed ſcheme of duties*, it is obvious that much more is neceſſary to render it *definite*, ſince it is obvious that a queſtion may be immediatly ſtarted, namely, what is it that conſtitutes our *real Intereſt*, and *who is to judge?*

Now could the Natural Law point this out with certainty to every man's heart and comprehenſion, there would be little or no difference of opinion concerning it for the Natural Law, as is properly and uniformly laid down, is *univerſal* and *immutable*. Yet we all know the immenſe diverſity of ſentiment concerning *real Intereſt* which there is, and muſt be, where there is no common *poſitive* Religion to decide upon it with authority; and in ſpeaking merely of a *natural* Law, all idea of ſuch a religion muſt be left out of the queſtion. (*l*)

Even with a poſitive Religion, much difference of opinion has ariſen upon various points of the Law of Nations. For example; one of the reaſons which produced the Treatiſe of VATTEL, was a revolting aſſertion of *Wolf* (whom he owns for his Maſter) that *the uſe of poiſoned arms, was legitimate in war.* (*m*) Some of VATTEL's own poſitions in other parts of his ſubject, ſeem to me, on his own principles, to be equally capable of conteſt. For example, he founds the *natural* obligation of Nations to cultivate commerce, ſolely upon its *utility?* and though he owns that one nation may refuſe to trade with the reſt, yet if it do ſo without *good reaſon*, he affirms it will be guilty of a breach of duty. (*n*)—But if *utility* is the ſole cauſe of this obligation, it muſt be obvious that its *univerſality* muſt entirely depend upon this, that *all* mankind conſider commerce in the ſame

(*l*) See Note *c*. page 4.
(*m*) Vattel Dr. des Gens. Prelim. 13, 14.
(*n*) Vattel Dr. des Gens. Prelim. l. 1. ch. 8.

light

light with VATTEL, which is known not to be the caſe. (*o*)

Who then can decide with clearneſs upon the Law of Nature itſelf, when extended into all the minute ramifications of a particular Syſtem, upon which *all* mankind are by no means agreed?

A great and very old queſtion therefore ariſes, concerning the OBLIGATION of NATURAL LAW *as far as it is ſuppoſed to tie us down to the obſervance of one, certain, and detailed ſcheme of duties, and no other*: In other words to the purſuit of what *particular* Nations call GOOD, or the rejection of what they call EVIL. If this cannot be ſhewn, we have as yet obtained abſolutely nothing, concerning ONE FIXED foundation, for a Law of Nations, binding, ex vi terminorum, upon all the Nations of the world; and as moſt of thoſe learned men who have acquired ſuch deſerved reputation for their reſearches upon the ſubject, have generally taken this part of it for granted, there may be yet ſomething wanting to the perfection of the Science.

In the preſent Chapter therefore I ſhall endeavour to examine, the force of the OBLIGATION which many judicious and virtuous perſons have aſſerted we are *all* of us under, to obſerve invariably *one particular*, and *certain* ſet of Cuſtoms, from the commands of nature alone. And if it ſhall be found that this obligation is at beſt but a weak one; or that upon the ſame principles which are ſuppoſed to recommend it, very *different* ſets of Cuſtoms may be, and are purſued with equal zeal; it is clear, I think, that with ſuch a ſort of *obligation*, we can arrive at nothing determinate with reſpect to the Law in queſtion. Should this be the Caſe therefore, I ſhall afterwards

(*o*) Suarez, as quoted in laſt Chapter, (Note *q*. p. 11.) aſſerts in poſitive terms, that there is no *obligation* to cultivate commerce at all.

terwards endeavour to come at what is likely to be the truth; and to point out whether what is commonly called the LAW of NATIONS, is binding upon *all* the World, or only upon particular *Sets* or *Classes* of Nations, as they fall into different diviſions of it, obſerving different Religions and purſuing different ſyſtems of Morality.

Preparatory to ſo important an enquiry, and in order to clear the queſtion in the outſet from ſeeming objections, it will be neceſſary perhaps to ſtate in form one or two *obvious* propoſitions; nor ſhall I be at all afraid of the danger of repetition, provided at the expence of being prolix, I may be certain of being perſpicuous; ſince all who have attended to ſpeculations of this ſort, muſt have perceived how much difficulty has often been occaſioned, by the writer's taking for granted that certain things are *already* underſtood, and that the exact queſtion is *already* known by the reader.

That we may therefore the more eaſily underſtand the following conſiderations, it will perhaps be right to make a diviſion of the Law of Nature, (which is a term of immenſurable extent) in order to come at once to what is the exact point of our enquiry.

The Laws of Nature then, may be divided into thoſe which concern *animate* and *inanimate* Being: the firſt of which only, is the ſubject of our ſpeculation.

The laws which govern this again, may be divided into Inſtincts and Reaſon.

Inſtinct without reaſon, is the law for the Brute Creation.

Inſtinct and reaſon together, form the law for MANKIND.

Thus, Man has as it were two natures. One in common with Brutes; inaſmuch as he obeys the laws of Inſtinct; another peculiarly his own, inaſmuch as he conſults the laws of reaſon.

Between

Between theſe two, there is this characteriſtic difference; that inſtinct acts with irreſiſtible power, while reaſon only directs or adviſes, and may be perpetually oppoſed. Hence, under the one, we are a blind and paſſive; under the other, we are a free agent; and it is to thoſe Caſes alone which come under the direction of reaſon, (that is, to Caſes which admit of a free agency,) that our enquiries are directed.

Hence then upon the whole, the point before us, is to aſcertain if poſſible, whether the duties and actions which we denominate *Moral*, (as that a man ſhall love his neighbour as himſelf,) can be ſaid to be *obligatory*, from what is called the Natural Law alone, "conſidered as diſtinct from the poſitive inſtitutions of man," (in other words, from Expediency or Utility,) *or the* REVEALED *commands of the Deity*.

A vaſt body of authorities, venerable for their age, their learning, and their powers of argument, hold the affirmative of this Queſtion. At their head, appear the whole band of STOICS, and the followers of SOCRATES and PLATO of ancient times; and among the Moderns, the names of SUAREZ, PUFFENDORF, HOOKER, LOCKE, (*p*) CUMBERLAND, BURLEMAQUI, VATTEL, TAYLOR, and above all, the profound BUTLER.

Theſe again are oppoſed by another great body of authorities, which are no doubt well known to the reader; and which, however they may differ from them in the main points of their philoſophy, are not to be neglected totally, or without diſcrimination. The philoſophers I mean, are the PYRRHONIANS, the EPICUREANS, and the SCEPTICS of antiquity; the Diſciples of HOBBS, SPINOSA, MONTAIGNE, DES CARTES of later days; and ſeveral others who

(*p*) On Government.

are

are remembered within our own age. We proceed to enquire into the difference between them.

The opinions of the firſt mentioned claſs of writers are founded upon the following argument.

Whatever is diſcovered to be the practice of the whole, or nearly the whole of mankind, and to proceed upon a certain known, general, and fixed principle, muſt be in conſequence of ſome law, which may fairly be called the law of man's nature. (*q*)

Now there is an *univerſal* principle of action in the hearts of all mankind, which is to ſeek happineſs as *ſocial* and *benevolent* beings.

This may be drawn from a review of the internal frame or conſtitution of man, which leads him, when unbiaſſed by his own particular intereſt, to wiſh the happineſs of *all* his fellow-creatures; to approve of virtuous actions wherever he obſerves them, and to deteſt their oppoſite vices. This approbation, and deteſtation, are impoſed upon him by a certain internal, great, and regulating principle, called CONSCIENCE or reflection; which, though his paſſions may lead him often to rebel againſt its power, it is nevertheleſs impoſſible wholly to blind or to deſtroy.

This great principle, adjuſting and correcting all inward movements, ought to preſide over and govern them; It is the inſtrument by which man is to be ſhewn what his real nature leads him to; and obligations to the practice of virtue deduced from this review of nature, " are to be conſidered as an ap-
" peal to each particular perſon's heart and natural
" conſcience; as the external ſenſes are appealed to
" for the proof of things cognizable by them. And
" thus, allowing the inward feeling *Shame*, a man

(*q*) Grot. J. B. p. 1. 1. 12. Puffend. 1. 6. 10. & 5. 3. 10. Barbeyr. Pref. to Puffend. p. 14. Hooker Eccleſ. Pol. B. 1. Sec. 8. Vattel. 1. 27, 28.

" can

" can as little doubt whether it was given him to " prevent his doing *ſhameful* actions, as whether his " eyes were given him to guide his ſteps." (*r*)

The truth of this opinion may alſo be drawn, from the compariſon of the nature of man as reſpecting ſelf, and as reſpecting ſociety; by which it will appear " that there are as real and the ſame kind of " indications in human nature, that we are made for " ſociety and to do good to our fellow-creatures; " as that we are intended to take care of our own " life and health and private good; and that the " ſame objections lie againſt the one, as againſt the " other," (*s*) For though crimes are often committed againſt ſociety; ſo are they often committed againſt ourſelves, by intemperance and other exceſſes; and as there is really no ſuch thing as abſolute ſelf hatred; ſo there never was an inſtance of ill will, *for its own ſake*, againſt mankind. Moreover, our paſſions and affections, conſidered merely as *private* by ourſelves; are in fact, *public* paſſions and affections alſo. Thus, the deſire of eſteem from others; the love of ſociety; (*conſidered as diſtinct from the good of it*;) and indignation againſt ſucceeſsful Vice; theſe are *public* paſſions; relate to others; and lead us to regulate our behaviour ſo as to be of ſervice to our kind. And thus the general diſpoſition of our inward frame, is calculated to do good to our fellows, as well as to ourſelves; and any thing contrary to this in either caſe, is not to be conſidered as *le-*

(*r*) Butler's Second Serm. on Hum. Nat. Serms. p. 26, 27, 28. Barbeyr. Preſ. to Puffend. p. 4. Il ne faut preſque pas ſortir de ſoi meme, ni conſulter, d'autre maitre, que ſon propre Cœur. Burlemaqui goes ſo far as to deduce Virtue and Juſtice from mere Sentiment and Taſte, which, ſays he, foreſtal reaſon. Dieu a donc jugè apropos d'employer auſſi cette voye à légard de la conduite morale de l'homme; et cela en imprimant en nous, un *ſentiment*, un *gout* de Vertu & de Juſtice, qui previent en quelque ſorte le raiſonnement.—Du Droit Nat. 2, 3, 5,

(*s*) Butler's Firſt Serm. on Hum. Nat. p. 5, 6.

gitimate

gitimate, but as the effect of mere ungoverned paſſion. (*t*)

That this ſort of ungoverned paſſion, (though apparently natural,) is in reality contrary to nature, is diſcoverable firſt, from an attention to the various meanings of the word Nature; and afterwards by fixing the true one, which forms the ſubject of the ſpeculation. For it does not mean merely, *any* principle in man, without regard either to the kind or degree of it; (ſuch as the paſſion of anger or the affection of a Father for his children, which may both be called *natural:)* neither does it mean *merely* thoſe paſſions which are *ſtrongeſt* in a man, (in other words his ruling paſſion,) which is often and juſtly enough put for the *nature* of ſome *particular* man; in which light nature may be vitious, as well as virtuous. (*u*) But it means, that *reaſonable*, *reflecting*, nature, which teaches men to do that which SELF demands of them, "after a view of all its conſequences;" by which it will never ſuffer them to prefer a mere momentary gratification, at the expence of future deſtruction; but ſomething that ſhall be gratification on the long run, all general conſequences conſidered as much as they can be, which therefore ought to embrace the intereſts and the right of others.

This is the nature which is meant by the ſpeculation; and in this point of view, what in common ſpeech may be allowed (though inaccurately) to be natural; may in the end turn out to be quite the reverſe. Thus, though a brute ruſhing into a ſnare for the ſake of a bait, may be ſaid fairly enough to purſue his nature; ſince it was natural for him to wiſh for the bait, and it was not in his nature to foreſee the conſequences;—Yet it is not ſo with man; who being endowed with reaſon, and governed magiſte-

(*t*) Grot. D. J. B. P. Prolegom. 6, 7, 8, 9.
(*u*) Butler's Serm. p. 33, 34.

rially

rially by the principle of reflection or CONSCIENCE, "which without being conſulted, approves or diſ-"approves of a thing, and renders man a law unto "himſelf," (*x*) is bound to give up preſent gratification in order to avoid certain ruin; and ſhould he chance not to do this, ſuch an action is nevertheleſs evidently *diſproportionate* to ſuch a reaſonable nature, and therefore in the ſtricteſt ſenſe, is *unnatural*.

But as the natural paſſion to gratify ſelf-love upon the long run; (that is, the duty to avoid preſent pleaſure, for future preſervation,) would incline a man to do this, however ſtrong his natural paſſion for pleaſure might be on the other ſide, and even although it abſorbed all others; it is evident that there is a difference between a REAL and REASONABLE ſelf-love, and that which is only deceitful; that is, *mere paſſion* which looks not to conſequences. This difference, not depending upon ſtrength, or degree, muſt be a difference in *kind*; and as, if ſuch paſſion as has been deſcribed, prevail over ſelf-love, it is *unnatural*; (*diſproportionate*,) while if real ſelf-love prevail over paſſion, it is natural; it is manifeſt that the TRUE and REASONABLE ſelf-love, is a *ſuperior* principle in nature to mere blind paſſion. Hence therefore, though it may be borne down by it, it is not the leſs ſuperior in its *nature* on that account; and the power of paſſion muſt be conſidered as *uſurpation* only, in the ſame manner as in civil ſociety it ſometimes happens, that a rebel who is more powerful, uſurps the Government of a lawful Sovereign; who however is not the leſs a lawful Sovereign on that account; neither is *power* conſidered as *authority*. (*y*)

As therefore the idea of a civil conſtitution implies united ſtrength, and various ſubordinations,

(*x*) Butler. Serm. p. 36, 37.
(*y*) Butler. Serm. p. 39, 40, 41.

under one head; namely, that of the Sovereign; and if you leave out the ſubordination, though all the members remain, yet the idea of civil government is deſtroyed; ſo reaſon, appetite, and paſſion, conſidered without connection or arrangement, do *not* give the idea of human nature; but that nature conſiſts in a certain *arrangement*, or *relation* which all theſe parts bear to one another; under which the paſſions or appetites, are to be conſidered as *ſubordinate* to reaſon and conſcience. And as a civil government may be deſtroyed by a rebellion, the ſucceſs of which does not render it legal; ſo alſo may the conſtitution of nature; in both caſes, the nature of what *ought* to be, remaining the ſame, notwithſtanding what is.

Hence, *excluſive of revelation*, Man is not a Creature left by his maker to act at random, and live at large up to the extent of his natural power, as paſſion, or humour ſhall direct; but from his make, conſtitution, or nature, he is in the ſtricteſt, and moſt proper ſenſe, a law unto himſelf: he has the rule of right within, all that is wanting is, that he honeſtly attend to it. (*z*) And therefore enquiries after any *general* rule by which our actions may be denominated good or evil, though in many reſpects they may be of ſervice, are of little with reſpect to this; ſince any plain honeſt man before he engages in any courſe of action; if he only aſk himſelf whether what he is about to do is right or wrong, good or evil, "will "be able to anſwer the queſtion agreeably to virtue "and truth, in almoſt any circumſtance." (*a*)

(*z*) Butler's Serm. 45, 46. et infr.

(*a*) Butler's Serm. 49. Barbeyr. Pref. to Puffend. 2. The laſt contents himſelf with ſaying, that the ſcience of morals may be acquired *juſqu a un certain degre*; though he adds par *tous* ceux qui veulent faire uſage de leur Raiſon, *dans quelque etat qu'ils ſe trouvent.*

Thus

Thus it is that the law of nature reſolves itſelf at laſt into the law of reaſon; and hence it is called "the dictate of right reaſon, pointing out that a "thing is morally right, or morally wrong, accord-"ing as it agrees or diſagrees with a *reaſonable ſocial* "nature." (*b*) Hence alſo, (if we muſt have a rule) there is a certain order, or fitneſs of things, to the ſupport of which all actions, to be right, muſt ultimately tend, (*c*) which is called the Syſtem of the law of nature; and which like all other Syſtems, is a whole, made up of component parts, the ſeveral relations of which to one another, produce the idea of what the ſyſtem itſelf is. In man this whole, or Syſtem, has for its parts, the appetites, paſſions, and affections, and the principle of reflection or CONSCIENCE, which compoſe his inward frame; the relations of which to one another conſidered, produce the idea of what his inward frame or conſtitution is, from which it appears plainly, that it is adapted to VIRTUE. (*d*)

Laſtly, as this muſt be an UNIVERSAL and IMMUTABLE law, or ceaſe, from the terms, to be the law of nature; every man whoever lived, "whatever "may be his ideas concerning the formation of "things: even ſhould he have the misfortune to be "an Atheiſt, is bound to obey it." (*e*)

Such is the argument of a great and reſpectable body of writers, who would prove a priori, from *their* ideas of the reaſonable ſocial nature of man, that the law of that nature obliges him to the practice of virtue

(*b*) Jus Naturale eſt dictatum rectæ rationis, indicans actui alicui, ex ejus convenientia, aut diſconvenientia, cum ipſa natura rationali ac ſociali, ineſſe moralem turpitudinem, aut neceſſitatem moralem, &c. GROT. D. J. B. P. 1. 1. 10. 1.

(*c*) See the Relig. of Nat. delineat. p. 128. 6th Edit.

(*d*) Butler's Pref. to Serm. p. 10, 11.

(*e*) Elles (les loix naturelles) ſont *certaines*, *obligatoires*, et ſacrées pour *tout* homme raiſonnable; *abſtraction faite de toute autre*

tue and morality, " according to the ideas which " are commonly entertained of them;" ſince in order that there may be no miſtake, as to the *particular* duties which they enjoin under thoſe general terms, they go on to lay before us, the whole ſcheme of offices which men who have been in the habit of cultivating their reaſon to the utmoſt pitch of refinement, who have had all the advantages of civilization, and even of revelation, have agreed, after long and laborious reſearch, to call moral.

Thus, we are not only obliged in general terms, by the natural law, to do good, and avoid evil; to do as we would be done by; to cultivate juſtice, and to worſhip the Deity; but, coming to particulars, we are to conſider as crimes againſt nature, Adultery, Theft, Fornication, Uſury, Falſehood, and every thing that is forbidden by the Decalogue: (*f*) We are bound to avoid intemperance; to repair any

autre conſideration que celle de ſa nature; et quand meme on le ſuppoſeroit dans l'ignorance totale d'un Dieu.—Il n'eſt donc point d'homme, qu'elles que ſoient ſees idées, ſur l'origine des choſes, *eut il meme le malheur d'etre* ATHEE, qui ne doivent ſe ſoumettre aux loix de la nature, &c.—(Vattel Prælim. S. 7. in the notes.)

This is in the ſame ſpirit with GROTIUS (Prolegom. 11.) " Et hæc quidem quæ jam diximus, locum aliquem haberent, " etiamſi daremus, quod ſine ſummo ſcelere dari nequit, *Nullum* " *eſſe Deum*, aut non curari ab eo negotia humana," &c.

(*f*) Vide SUAREZ De leg. ac deo Legiſlat. L. 2. C. 7. 5.

Nam ea quæ naturali ratione cognoſcuntur, in triplici genere diſtingui poſſunt.—Quædam ſunt prima principia generali morum, ut ſunt illa, Honeſtum eſt faciendum, pravum vitandum: Quod tibi fieri non vis, alteri ne feceris; de his nullum eſt dubium, pertinere ad legem naturalem.—Alia ſunt principia, magis determinata et particularia: tamen etiam per ſe nota ex terminis, ut Juſtitia eſt ſervanda; Deus eſt colendus; temperate vivendum eſt: et ſimilia, de quibus etiam nulla eſt dubitatio, et a fortiori patebit ex dicendis. In tertio ordine ponimus concluſiones quæ per evidentem illationem ex principiis naturalibus inferentur, et non niſi per diſcurſum cognoſci poſſunt, inter quas, quædam facilius et a pluribus cognoſcuntur, ut Adulterium, Furtum, et ſimilia, prava eſſe. Alia majori indigent diſcurſu, et non facile omnibus

any miſchief we may have cauſed to others; to be always ready to render any innocent ſervice that another may ſtand in need of; to keep our words inviolably; to avoid treachery; to honour our Parents; and obey our Sovereign, " ſo long as he does no-" thing contrary to the invariable maxims of natural " right, or to the divine law as revealed to men. (*g*) All this, and much more, though they involve a number of points, many of which, as we ſhall preſently ſhew, are neglected by ſome Nations upon principle; and others depend on things, which are abſolutely *poſitive*; all this, it is contended, is enjoined by nature, with the force of law, " becauſe " it is written on the heart of man.

On the other ſide of the queſtion, there have been many theories put forth, ſome of them eccentric to a degree of abſurdity, others approaching nearer to a reaſonable ſhape, but all of them adverſe to this idea of moral obligation, confined to one particular ſyſtem, " drawn from the mere nature of things.

Without going into the detail of theſe ſyſtems, and premiſing in the ſtrongeſt terms our juſt horror, at thoſe of them which ſay, that there is no obligation at all; or that it is the nature of man to be *vicious*; or that at leaſt he has no law to follow but his own appetite; premiſing this, I ſay, I ſhall endeavour to examine the force of the foregoing argument, as far as it has been ſuppoſed to be concluſive as to the point of our diſcuſſion; which, it muſt be remembered, is ſimply whether, " without the aid of a viſi-" ble divine interpoſition," mere nature alone, can

omnibus notæ, ut fornicationem eſſe *intrinſice* malam; *Uſuram* eſſe injuſtam; *Mendacium* nunquam poſſe honeſtari, et ſimilia.

Again. Nam præcepta Decalogi ſunt *de jure Naturæ*, ut eſt indubitatum apud omnes, et tamen non omnia continent principia per ſe nota, ſed ubique indigent diſcurſu, ut etiam eſt clarum. Id. Sec. 6.

(*g*) Barbeyr. Pref. to Puffend. P. 13.

point out the obligation upon ALL the world, INVARIABLY to obſerve the SAME moral duties.

Now it appears to me that the whole of the argument on which the affirmative of this opinion is founded, is liable to one great and invincible objection; namely, that it does not *ſufficiently* eſtabliſh the point, that the *mere ſocial* nature of man carries along with it uniformly, univerſally, and of neceſſity, all that train of *ſocial* duties, purſued through all their ramifications, which compoſe the moral ſyſtem of particular claſſes of nations, and which have been attributed to *all* the world, with what juſtice, ought to have been more fully made out by facts.

That man is a ſocial or gregarious animal, no one will deny. That he cannot be this, and at the ſame time ſeek *as the end of his being*, the deſtruction of thoſe with whom he aſſociates, is equally clear. But it does not follow, (at leaſt not without ſome farther enquiry,) that becauſe he is *ſocial*, he is bound to purſue *one*, *definite*, and *certain ſet of* actions, as the ſyſtems of natural morality would always have us ſuppoſe.

It is of extreme conſequence to ſettle this in the beginning, becauſe the whole will depend upon it. If he really is thus bound; that is, if *all* mankind have always thought it writ down in their duty, to purſue the common GOOD in *one*, *particular manner*; then, every thing that has been ſaid concerning the neceſſity of ſupporting the order and fitneſs of things to produce a *general* ſocial happineſs, will hold good.

But if he is *not* thus bound; if it ſhould appear from FACT that the opinions of men concerning the manner of arriving at good, are ſo various, that although we may ſay which is the right one for ourſelves, we cannot determine for others; then, what has been ſaid concerning the dictate

of right reaſon, pointing out that a thing is morally right or morally wrong, from its agreement or diſagreement with a reaſonable ſocial nature, can be applied only to thoſe who concur in their ſentiments concerning good, and cannot be made binding *a priori*, upon thoſe who have ſentiments of an oppoſite nature. We wiſh it, however, to be underſtood that in reaſoning concerning moral agents, we do not mean to take into the account, any of thoſe who *confeſſedly* give looſe to their paſſions at the expence of reaſon; but only thoſe who purſue the courſe of life, and the habits and maxims preſcribed to them by their education, and their laws; of courſe, as far *as we are able to collect it*, who purſue their reaſon and judgment.

Now, if it ſhould turn out that *all* ſuch as theſe, do not uniformly and invariably act according to the ſame codes of duty; if many of them, (finding themſelves independent of all *external* motives of religion, or poſitive conventions, and able, from mere ſtrength, to ſhift for themſelves,) appear to be indifferent about the fitneſs of things in the *ſenſe which is put upon it*; or what is ſtill more conſequence, appear to have a fitneſs of things, as it were, peculiar to themſelves, in ſome caſes perhaps, the very *oppoſite* of the other; if this ſhould be the caſe, I do not ſee how it can be ſaid that the *nature* of man obliges the whole world to act uniformly and immutably in one, particular and definite manner.

This enquiry into facts; in other words into the hiſtory of Man, in order to come at his nature in theſe points, may appear unneceſſary to thoſe who take their ideas of univerſal morality, ſolely from their own. And indeed I have ſometimes heard it aſſerted, that as the laws by which reaſon works are *immutably* the ſame; whatever is made out by

reaſon to be the law of nature, muſt be ſo *to every one*, without any enquiry at all.

If we take the matter up a little higher, we ſhall however find that this is erroneous—For although when our nature is once aſcertained, reaſon may decide whether particular actions are enjoined by the law of nature or not; yet it is not reaſon alone, but reaſon and fact together, which muſt determine what our nature is, or what it is not.

Of reaſon I have no other idea, than that it is the faculty of the mind which teaches us to draw concluſions from certain premiſes. What the premiſes are themſelves, unleſs they again are to be deduced by reaſon from others, it never will teach.

Thus, although the heart and the feelings once thoroughly known, reaſon may point out the folly, or, in the language of the argument, the *diſproportion* to nature, which is diſcoverable in the indulgence of blind paſſion at the expence of ultimate preſervation; and may that way, as has been ably ſhewn, decide upon what is nature and what is uſurpation: Although it may point out the *utility* of gratitude, affection, and general benevolence; yet it cannot plant thoſe feelings in our boſoms. A man cannot force himſelf by reaſon, to be grateful, affectionate, or benevolent, if he happens to have the misfortune to be born without thoſe feelings. Reaſon at leaſt is ſo far from implanting them, that the STOICS, who place all happineſs in wiſdom, which is the perfection of reaſon, ſeemed to have for their object the abſolute eradication of paſſion and affection.

Reaſon, therefore, as was obſerved, although it will point out to us what ought to be our conduct, (*our nature being fairly underſtood*, will not *of itſelf* tell us what that nature is; and our knowledge in this reſpect muſt be derived ſolely from the

ſenſes,

ſenſes, from obſervation, experience, and matter of fact.

When theſe have been conſulted, we come at what we muſt always poſſeſs ourſelves of, before reaſon can begin to work; namely, the PREMISES, the combination of which produces the concluſions drawn by reaſon; and if there ſhould happen to be a difference about theſe *premiſes*, the concluſions, even of reaſon, cannot be immutably the ſame. When however, they have been aſcertained; then, and not till then may reaſon ſtep in and pronounce upon the conformity of any action to a general rule thus obtained.

And this is the ſole meaning of our adding the epithet *reaſonable* to nature; and of coupling, as we conſtantly do, the terms *laws of reaſon*, and *laws of nature*, in the ſame phraſe.

This then being ſettled, we are ſent to the Hiſtory of the actions of man, to enquire what his nature is; and if we ſhould diſcover that the tendency to purſue, *one, definite ſet of actions*, is not univerſal; or that the ideas of GOOD are not uniform; that is, if there ſhould be ſtrong, marked, and ample exceptions to theſe points; the argument concerning a particular ſyſtem of morality for all mankind, enjoined by the Law of Nature, as far as it is drawn from the *univerſality* of its reception, muſt be given up.

That a law of *nature*, to be binding, muſt be ſhewn by the fact to be received by all mankind, may I think be made out, ſhould any doubt be entertained upon it, from the following conſiderations.

Whoever has obſerved the various ſenſes in which the word nature is uſed; whether applied to the whole univerſe, or only to the world called earth; to the properties of all created ſubſtance, or only to particular diſtinct ſpecies of it, as living or inanimate, being; or ſubdivided again into parti-

cular parts of theſe, as vegetables, or ſtones; brutiſh, or reaſonable animals; will nevertheleſs diſcover that it conſtantly means a *whole*, either abſolutely, or relatively; that is, if a *Genus*, the *whole* of that *Genus*; if only a *Species*, the *whole* of that Species.

Thus, the term Nature, when put by itſelf, means invariably the *whole* order of things; the το παν of the ancient philoſophers. (*h*) When we talk of the *nature* of matter, we mean all matter; when we talk of the *nature* of animals, we mean all animals; when of the *nature* of human kind, we mean all human kind; and hence human nature is put for ALL men.

Even if we talk of the *nature* of particular diviſions of men; ſuch as the Africans, the Tartars, or the Italians; we ſhould mean the nature of all the Africans, all the Tartars, all the Italians; ſo that if we were to ſay, that it was the nature of the Africans to be black; and *many* of them were to be white; or of the Tartars to have no towns but to love a wandering life; and *many* of them found eſtabliſhed in cities; we ſhould, I believe, be judged by all men, even the moſt circumſcribed in their intellectual powers, to have given a very erroneous account of their *nature*.

NATURE therefore, in this acceptation of it, is what the Logicians call the ESSENCE of a thing; it is that, without which the thing deſcribed, would not be *what* it is deſcribed, of courſe, it muſt comprehend, and ſpread itſelf through every part of the thing. Thus, (to purſue our illuſtration) if an Indian who had never been out of the torrid Zone, (and

(*h*) . . . . . Airs, vernal airs,
Breathing the ſmell of field and grove, attune
The trembling leaves, while UNIVERSAL PAN,
Knit with the Graces and the Hours in dance,
Led on the eternal Spring.—*Par. Loſt*, IV. 265.

who

who therefore believed, that it was a law of nature for rivers to be perpetually in a fluid ſtate;) were to viſit a higher latitude, and to ſee the rivers gradually congealing by froſt; he would be obliged on his re-return home to tell his brother Indians, that they had been wrong in their ideas concerning the law of nature with reſpect to rivers.

Now to apply this (if the reader has not done it already) to the laws of nature as they concern human kind; it will follow, that if theſe particular moral duties, ſuch as they have been detailed above, are not received as moral duties, all over, or nearly all over the world; no obligation can be made out from the heart, or the impulſes of the nature of man, by which, independent of external motives, (*i*) we are all of us bound to obſerve them; and as the Indian traveller was forced in viſiting higher latitudes, to give up the idea of the law of nature concerning the invariability of the ſtate of rivers; ſo muſt a moral philoſopher who argues for the obligation impoſed by his ſyſtem, from the univerſality of the feelings and diſpoſitions on which the duties he enjoys are founded; be forced to give up this obligation, ſhould the fact of the univerſality, be fairly ſhaken.

In this reſpect therefore the rules of philoſophiſing with regard to morals, may be compared to the rules of philoſophiſing in phyſics; by which it is laid down, that "the way of ANALYSIS, ought ever to precede the method of COMPOSITION; which analyſis, conſiſts in making experiments and obſervations, and in drawing general concluſions from them by induction; and although the arguing from experiments and obſervations by induction, be no demonſtration of general concluſions; yet it is the

(*i*) Namely, of Religion, or the Civil Power.

beſt

beſt way of arguing, *which the nature of things admits of*; and may be looked upon as ſo much the ſtronger, by how much the induction is more general. And if no exception occur from phœnomenon, the concluſion may be pronounced generally. But if at any time afterwards, any exceptions ſhall occur from experiments; it may then be pronounced with ſuch exceptions." (*k*)

Now I own, I do not ſee why this reaſoning of the greateſt of all experimental Philoſophers, ſhould not hold good with reſpect to morals. And ſhould it do ſo, it will follow, that if upon an analyſis of their modes of thinking, to be found in the hiſtory of mankind, there are any particular ſets of actions which obtain *univerſally* and *uniformly* amongſt them as duties; thoſe duties may be fairly ſaid to proceed from the NATURAL LAW. But if thoſe ſets of actions are found to be rejected by vaſt numbers of men; and not only this, but that their oppoſites are ſubſtituted to hold their places equally as duties; why then, the concluſion is to be pronounced not *generally*, but with ſuch *exceptions*.

We might not heſitate even to affirm, that as what have been ſometimes ſuppoſed to be the laws of nature as relative to phyſics, have been abſolutely overturned by a long, uniform, and adverſe ſet of experiments; ſo, were the fact to happen that men were found univerſally to purſue a conduct the very oppoſite to that which in *general* they think themſelves obliged to adopt, the ſuppoſed natural law of mankind might alſo be ſaid to be overturned; ſo much does the diſcovery of what this natural law is, depend upon experiment, that is upon what actually is the *general* conduct of men. Always however provided, that ſuch an oppoſite conduct is adopted in compliance with the *deliberate judgment* of thoſe

(*k*) Vide Sir Iſaac Newton's Method of Philoſophiſing. Optics, P. 280.

who purſue it and is not a mere *violation* in practice, of what is received and ſettled in theory.

As therefore before the introduction of experimental Philoſophy, abundance of Hypotheſes were often ſtarting forth, which whatever ingenuity they might evince before the facts were enquired into, were inſtantly put down and confuted by adverſe experiments; ſo it is very poſſible in morals, when men argue *a priori*, and aſſume things as fact, which may not be ſo, or not ſo in ſufficient univerſality, for the whole fabric which they build, whatever may be its beauty or magnificence, to fall with its foundation.

Hence then it is we imagine, that the whole of this intereſting ſubject reſolves itſelf at laſt into the HISTORY OF MAN; to that, and that only can we refer, it is the ſole point to which the forces of the two contending opinions can be ſatisfactorily directed; it is the only iſſue, that can be fairly joined, ſo as to produce a laſting concluſion. For in vain do we purſue the matter through all the ſubtleties of intellect; in vain are the profoundeſt metaphyſics made uſe of to prove any one thing concerning the nature of man, *a priori*. Of that nature I can obtain no knowledge, except through the ſame channels by which I become acquainted with the nature of any other animal; nor can I tell what it is that nature demands of man to do, except by enquiring what he has actually done.

Now, if in making this enquiry, we were to find, that mankind were like a multitude that ſet forth to attain the ſummit of a difficult mountain; and many paths preſenting themſelves, that they all of them, or nearly all, took the ſame path; we might then with tolerable juſtneſs be led to believe, that they were *impelled* to it by ſome deſtiny, or law. But if, on the contrary, no external influence ariſing to deter them from all but one, the fact actu-

ally

ally proved to be that they often fell into different tracts; we ſhould have no inducement to believe that only one of the various paths was the right one.

And no advice being given, no reward held out, no puniſhment threatened; in ſhort being under no influence, other than the appearance which the paths might wear to bias their judgment; we could not reaſonably imagine that it was a crime to enter into any one of them, more than another.

When however a track was once choſen, and that *upon a deliberate and firm belief that it was a right one*, even though in the end it ſhould lead into mere labyrinths and quagmires, the ſet of travellers that purſued it would be bound to do ſo until they diſcovered their error; and thus, though there were as many different ſets of travellers as there were paths, each ſet would be under equal obligation, *in their own minds*, to continue their courſe.

The hiſtory of the mind of man will probably upon examination appear to conform to this allegorical account of it. Some great principles may no doubt be found in ſuch univerſal ſtability, that they may very fairly be ſaid to form the Law of Man's Nature; as the deſire of happineſs; the purſuit of good; and the rejection of evil; and ſubordinate to theſe, the wiſh to ſupport the intereſts of our country or families; for without theſe, the nature of things in theſe points, would indeed be deſtroyed. But when we come to the particular detail of the manner in which we can beſt arrive at theſe great objects, we muſt give up the expectation and even the hope of univerſality; for whether we take ſavage or civilized life, it will be found that the ſcience of morals, which every one would have to be ſo certain, has been, *when diveſted of the viſible and protecting hand of the Almighty*, capable of almoſt as much diverſity of opinion, as there has been diverſity of feeling and ſentiment in different claſſes of men.

I mean

I mean not (as before obſerved) to draw any concluſions from the example of thoſe men who confeſs an indulgence of paſſion at the expence of reaſon; but of thoſe only who think they are acting rightly; of thoſe even who have been remarkable for the ſubtlety of their underſtanding; many of them eminent for gravity, and ſome of them for ſuperior virtue.

Thus CARNEADES, reaſoning upon the obligations of morality, aſſerted that there was really no ſuch thing as a law of nature; no ſuch thing as JUSTICE; but that every thing that appeared uſeful, was thereby rendered lawful. GROTIUS could only ground the confutation of this, upon the diſpoſition of man towards ſuch a ſtate of ſociety as is ſuppoſed by the argument we are canvaſſing; *not*, ſays he, *qualiſcunque, ſed tranquillæ*; (*l*) which tranquil ſtate, whether it is *univerſally* pitched upon to be the happy one, it is obvious can only be determined by an enquiry into the fact.

The celebrated HOBBS again, as is well known, queſtions this laſt opinion in the moſt direct manner, when he ſays the very nature of man leads him to war with his fellows. EPICURUS made all happineſs to conſiſt in pleaſure, either mental or corporeal; without any great ſecurity for the rights of others which might ſtand in the way of it. ARISTIPPUS confined it to *ſenſual* pleaſure; and the STOICS baniſhed all pleaſure whatſoever, by endeavouring to render the mind, what it certainly is not, an abſolute blank with reſpect to the affections; and if pain could not be ſubmitted to, their only reſource was in ſelf-murder. (*m*) The CYNICS, from princi-

(*l*) D. J. B. P. Prolœgom. 6.

(*m*) ZENO ſupported his own precepts upon this point in a manner ſomewhat extraordinary, when he hanged himſelf merely becauſe he broke his finger.

Stanley's Lives, &c. 297.

ple,

ple, threw off all appearance of decency, and performed the moſt immodeſt and diſguſting offices of nature, in public, upon the ſole idea that it was nature that had enjoined them. The SCEPTICS and followers of ARCESILAUS doubted of every thing; refuſing to decide that any one thing was ſtrictly virtuous or vicious; doing away by ſuch tenets, the whole advantage of Moral Philoſophy. (*n*) PLATO, indeed contended for the dignity of human kind, and a refinement of friendſhip approaching to chimerical; but ARISTOTLE at leaſt confined it to the handful of men called Greeks; when he laid it down that ſtrangers were meant by nature to be their Slaves, and accordingly, that it was allowable to make them ſo wherever they could find them. The ROMANS, all wiſe as they were in the natural law, ſeemed to have had this Dogma in view, in allowing by their Digeſt, the reduction to captivity of all thoſe between whom and themſelves there was no treaty. (*o*)

They were equally faulty in maxims that regarded their private lives; of which their filthy and depraving cuſtom of lending their wives to one another, (a habit which it ſhould ſeem is as revolting to nature as any, and expreſsly forbidden by the writers on natural law,) is a ſufficient proof. Nor did this exiſt when Rome was the receptacle of ſavage banditti; but when ſhe was the abode of the Arts, of Stateſmen, and of Orators. (*p*) A neighbouring nation who boaſt themſelves ſtill more wiſe than the Romans, ſeemed to go as far as they did in this point, when they paſſed the licentious law by which

(*n*) See Stanley's Hiſt. of Philoſoph. tit. Diog. & Arces.

(*o*) Vide infr. Chap. VI.

(*p*) *Cato* lent his wife to *Hortenſius* (ſhe being then big with child) but a few years before the Auguſtan Age. The latter, as is well known, was an orator of the firſt rank, and a very accompliſhed man.

married

married perſons might be divorced, without aſſigning any reaſon, but the mere perſevering determination of either of the parties; a kind of marriage which, I confeſs, I cannot diſtinguiſh from that of a Lion and Lioneſs in the woods, who copulate together and depart as they pleaſe.

The ÆGYPTIAN laws gave a ſanction to Inceſt. By the ATHENIAN, a man might marry his Siſter by the Father's ſide; and if a woman was an heireſs, ſhe was bound to marry her next of kin—If alſo her huſband was old and impotent, ſhe was permitted to cohabit with his neareſt relation! and this was a law of the far famed SOLON. (*q*) In the ſame ſpirit with this, the Incas of *Peru* could only marry their ſiſters, if they had any; if not, their neareſt relation. (*r*) A Tartar, upon the death of his father, married all his Wives, except his Mother; (*s*) and marriages with Siſters were permitted among them, and was ſometimes even a duty, although fornication was puniſhed with death. (*t*)

If this kind of inceſtuous marriage however is not unnatural, (which has been held by ſome;) (*u*) others, which have been expreſsly condemned as ſuch, (*w*) have alſo met the ſanction of very extenſive and even wiſe nations. ATTILA married his Daughter, in mere compliance with the SCYTHIAN cuſtoms; and the MAGI of the Perſians, following the laws of ZOROASTER, not only allowed the marriages of Parents and Children, but enjoined that the members of their own body could only be taken from the offspring of ſuch a commerce.

And how is it that men have been known to treat their Children; not in a burſt of paſſion, *diſproporti-*

(*q*) Potter's Antiq. 1. 170.
(*r*) Picart. Cerem. Relig. 3. 204.
(*s*) Rubruquis Voy. ap Hackluyt. 1. 99.
(*t*) Carpinis Trav. ap Hackluyt. 1. 55.
(*u*) Grot. D. J. B. P. 2. 5. 12. 1. (*w*) Id. 2. 5. 12. 2.

onate

onate to a reaſonable cool ſelf love, but upon a *deliberate* principle of doing what they thought was good. The LACEDEMONIANS, in order to enſure a hardy race of men, deſtroyed all their infants that appeared infirm; nor were parents allowed to rear them, even if inclined to do it. The new born children were carried before certain Judges called Triers, who if they appeared likely to thrive, gave orders for their preſervation; if not, they were thrown into a deep Cave of Mount Taygetus. (*x*) The ſame practice of expoſing children was nearly univerſal over Greece, the Thebans being praiſed by Ælian for being the only people in the country, by whom the cuſtom was prohibited. (*y*) By the Laws alſo of the Twelve Tables, the Romans were even commanded to deſtroy thoſe of their offspring who were eminently deformed. "Pater, inſignem ad deformitatem, "puerum cito necato." (*z*)

Nearer to our own times is the ſtill exiſting cuſtom of the CHINESE; nor is it an excuſe, but rather an aggravation to ſay, that *neceſſity* legitimates the practice; ſince the riches and the wiſdom of CHINA are the boaſt of the world, and the neceſſity complained of muſt be owing, not to the *want* of food, but the improper diſtribution of it.

In the thirteenth century, BARTOLUS, the moſt famous Civilian of his time, and therefore the moſt likely to underſtand the law of nature, contended gravely that the Emperor of GERMANY was the Emperor of the World; and DANTE, another Civilian, aſſigned a reaſon for it, founded no doubt on the natural law, ſince he ſuppoſed it to be ſo, becauſe it was for their good. Both antient and modern nations, and the wiſeſt men amongſt them, have concurred in juſtifying the Slavery, not merely of per-

(*x*) Potter Antiq. 2. 333. (*y*) Ælian. 2. 7.
(*z*) Mem. des Inſcriptions. 12. 78.

ſons

ſons who may be ſuppoſed to have *forfeited* their liberty; but of thoſe who have not even ſeen the light: For this they do when they aſſert, that as children muſt follow the lot of their mothers, the children of female *Slaves* muſt be *Slaves* alſo.

Laſtly, the Legiſlators of twenty-five millions of men in FRANCE, affirmed, that it was *Nature* that had pointed out the true bounds of their Empire to be the SEA and the RHINE; and accordingly twenty-five millions of men wage bloody war, in part, to ſupport this moſt natural propoſition. All theſe abſurdities, theſe horrors, and this injuſtice, are quoted, not as the *temporary* and avowed *rebellion* of the paſſions againſt reaſon; but as the dictates, to thoſe who held them, of reaſon herſelf. Nor were they the maxims, or rule of conduct of *inſane*, or *wicked individuals*; but moſt of them, as we ſee, are drawn from immenſe and important Empires; from the Schools of Sages, and the lives of Heroes. (*a*)

Thus much for the idea of *civilized* men and nations upon this ſubject. Were we now to go into the detail of the practices of others, who have never been in the habit of cultivating their reaſon, to any great height; we ſhould contemplate that frightful picture of deformed humanity, which has induced many to believe that man is really meant by nature to be even a *vicious* being; than which nothing, as has been obſerved, is farther from our opinion.

The examination however of the accounts of ſavage life is demanded by our ſubject, becauſe it has been ſometimes ſuppoſed one of the moſt certain methods by which we may diſcover what our nature really is. Men, it is contended, are ſo much the Slaves of habit and prejudice, that it is very difficult

(*a*) Thoſe who would go deep into this hiſtory of opinions may read the latter part of Barbeyrac's Pref. and conſult Stanley's Hiſt. of Philoſ. and Bruck. Hiſt. Philoſoph.

for

for them to reaſon upon things with that freedom, and as it were, *nakedneſs* of mind, which truth demands for its certain *developement*. And hence many philoſophers, in their reſearches upon this ſubject, have preferred the leſſons drawn from the opinions and cuſtoms of men, who approach neareſt to the rude ſtate of nature, to the more ſplendid, but leſs certain documents which are preſented by a cultivated State of Society. Hence alſo aroſe the Theory of the State of Nature itſelf, which many have imagined, in order the better to ſet before us the deductions of their opinions.

If however, as we have contended, it is FACT which muſt determine all theſe points; we muſt pay no regard to the mere *theories* of what man *would* do in this ſtate: but confine ourſelves to what he is known to have done, in thoſe circumſtances in which he has *actually* been viewed.

But ſhould we do this, the ſavage ſtate is the moſt unfortunate of all others which writers could lay hold of in order to ſupport their opinions concerning the *natural obligation* upon *all* men to purſue any particular ſyſtem of morals; ſince it is notorious that there is no rule ſo ſacred among mankind, (if by mankind we mean *civilized* people,) no duty ſo venerable, no conduct ſo beautiful, as not to be rejected almoſt invariably by Savage Nations, and their very oppoſite ſubſtituted in their places.

It was held by SUAREZ, (*b*) that all the crimes of the Decalogue, are crimes againſt the law of nature. There is hardly one of them, that is not practiſed, and that almoſt invariably, by thoſe who approach neareſt to what is called a ſtate of nature. They have a variety of Gods, and ſet up graven images; of the holineſs of the ſeventh day, they can have no idea; if they honour their fathers and mothers, they do it

(*b*) Ut Sup. p. 32.

at

at leaſt in a way which fills civilized people with horror: ſince they knock them on the head, or feed upon their bodies and entrails, (than which it would appear nothing can be more revolting to nature.) (*c*) Their murders, their thefts, their adulteries, (attended ſometimes with circumſtances of horror,) (*d*) and

(*c*) The *Tartars*, ſays Hackluyt, have a ſtrange, or rather miſerable kind of cuſtom, "for when anie man's father deceaſ-"eth, he aſſembleth all his kindred, and they eat him." (Voyages 1. 59.) The people of *Tibet* uſed to eat the carcaſes of their parents, not from want, but that for pity's ſake, they might make no other ſepulchre for them than their own bowels; (Id. 1. 116.) and even ſo late as 1253, they continued to make drinking cups of their ſkulls. (Ib.) The Africans are ſaid to have fed conſtantly on the dead bodies of their friends; (Dapper ap. Picart. 4. 476.) and the Floridans, the Mexicans, and the Caribs ground the bones of their relations to powder, and drank them. (Id. 3. 133. 141. 166.) The Iſlanders of *Sacatara*, when their friends are dying, do not wait their laſt moments, *but bury them alive*. (Id. 4. 503.) To this head may alſo be referred the noted cuſtom of the Indian widows, of burning themſelves with their huſbands' bodies, and of many people on the ſame continent, among whom, when a huſband or wife dies, it is a point of honour for the ſurvivor to be buried with the corpſe. The inhabitants of *Java* were not content to deſtroy their old men, or ſuch as could not work, but carried them regularly to a public market, and ſold them to the Anthropophagi. (Id. 4. 136.)

(*d*) Among the Banians, an extenſive ſect that ſpread themſelves through all the provinces of India, (Broughton's Hiſt. of Relig. Voc. Ban.) the Huſband poſſeſſed his Wife only the firſt night, and afterwards all his Brothers alternately to the ſeventh, if there were ſo many, during the ſeven nights after; and the huſband could not claim his wife excluſively from his brothers, but ſhe and her iſſue were common to them all. (Picart. Cerem. Rel. 4. 149.) The Moguls kept their Women in common, both Mothers and Daughters upon principle. (Id. 4. 364.) And the like cuſtom is recorded by Cæſar to have had place among our anceſtors in Britain. "Uxores habent deni duodenique inter ſe "communes, & *maxime* fratres cum ſororibus, et parentes cum "liberis;" &c. (De Bell. Gall. l. 5.) So alſo the Otahietans, among whom, in addition to the almoſt univerſal licentiouſneſs of the women, there exiſted a horrid Society or Club, in which all the women were not only common to all the men, but the children were deſtroyed as ſoon as born. (Cook's Voyages.)

their covetouſneſs of other mens goods, are too univerſally known to need much amplification.

It is held that the law of nature obliges men to reſpect each others property. The time was, and is, when amongſt vaſt nations of men, to plunder, not from one another, but from all the reſt of the World, was conſidered as the higheſt duty, and ſucceſs that way, the higheſt praiſe. (*e*)

It is held, that parents are to protect and cheriſh their children. Numerous are the inſtances, where children are expoſed, or ſold to ſlavery, or wantonly put to death, and even *eaten* by their parents, without that *neceſſity*, which alone can bear the ſemblance of a reaſon for it. (*f*)

It

(*e*) Many nations are known to ſubſiſt by the pillage of Travellers who paſs through them to other countries, as the Arabs, and many of the Tartars; The Malays are nearly all pirates; and ſo formerly (nor were they aſhamed of it) were ſeveral nations of antiquity; Thucydides obſerving that among the ancient Greeks to be aſked whether a people were pirates, was not to reproach them. The Solitary Indian who was met by Captain Cook in Duſky Bay in New Zealand, being preſented with hatchets, and aſked what he would do with them, ſaid he would go and kill men. (Foſter's Voyage.) The king of *Benin*, in Africa, upon aſcending the throne, maſſacres numbers of his ſubjects in honour of his acceſſion. (Picart. 4. 450.) The *Guages*, a people of the ſame country, when they go to war, elect and conſecrate a General, who at a ſacrifice is preſented with a hatchet, with which, as a proof of the proweſs to be expected from him, he is to cut down a youth that is brought to him at a blow. (Id. 4. 472.) The Scandinavians waged univerſal war: but we ſhall have occaſion to obſerve theſe points more particularly in the hiſtory of the Law of Nations.

(*f*) Among the Mexicans, if a Mother died while ſuckling, and in Madagaſcar if in child-bed, the child was put to death, in order to prevent its being an orphan. (Picart. 3. 176. 4. 510.) In Bengal, formerly, if a new born child refuſed the breaſt, it was expoſed a whole day upon a tree in the woods, to the mercy of the Crows and Inſects, and taken down in the Evening. If it ſtill refuſed, it was expoſed a ſecond day, and if it refuſed a third time, it was thrown into the *Ganges*. (Tavernier's Trav. l. 3.) The *Koraſhites* deſtroyed their daughters, thinking many of them a nuiſance;

It is ſaid, that USURY is forbidden by this law. Yet nearly the whole World, concur in the practice of demanding intereſt for money, and the virtuous BRUTUS himſelf, ſo celebrated *for giving every man his own*, was one of the moſt noted Uſurers of his time.

It is held, that nations ſhould do as little harm as poſſible to one another in war, conſiſtent with their mutual intereſts. Yet who ſhall reconcile this with the horrid cuſtom ſo prevalent among Savages, of eating priſoners out of revenge; nay of refining their taſte on this point, and taking pains in the preparation, in order to render the repaſt more exquiſite? (*g*)

a nuiſance; and when the mothers were in labour, they were carried down to a grave ſide, where if the child was a female, ſhe was inſtantly buried alive. (Picart. 6. 111. confirmed by Pococke.) The inhabitants of *Caucaſus*, made a trade of their children, and take many wives for the expreſs purpoſe of *producing for the market, in the ſame manner as if they were cattle.* (Chardin's Trav. ap Harris. 1. 865.) The Amazons are ſaid to have mutilated their male infants as ſoon as born, in order to prevent their being formidable to them. And to this head may be fairly referred the ſhocking cuſtom ſo familiar with our own days, of emaſculating children for the purpoſes of Jealouſy in the *Eaſt*, and of amuſement in *Italy*; which latter is ſtill more unnatural, ſince the preſervation of a wife's chaſtity is of more conſequence, than the gratification of a mere paſſion for muſic.

(*g*) The ancient Cannibals of *Ireland* are ſaid to have conſidered the poſteriors of boys, and the breaſts of women as the daintieſt diſh. (Speed. 167.) The Brazilians would not eat their priſoners till they were fat, and of a certain age; and if any one, deſtined to the ſlaughter houſe, was lean, he was carefully fattened. During the interval, (probably with a view to bring him ſooner into good plight) he was allowed every ſort of amuſement, and even a woman for his companion; who ſo far put on the appearance of a wife, that when he was actually butchered, ſhe howled and wept as if ſhe had loſt her beſt friend; but when he was cut up, ſhe partook of the feaſt with her countrymen. (Picart. 3. 183.) The Antis, a people of South America, cut their priſoners piecemeal *while alive*; and the women, ſmearing their nipples with the blood, gave them their children to ſuck. (Id. 3. 199.)

It is aſſerted, that the law of nature obliges us to obey our Sovereign, ſo long as he does nothing contrary to natural right.—What that natural right exactly is, has puzzled, or at leaſt divided, all the ſages who have inveſtigated it—Thus, when the FRENCH wiſhed to overthrow their old conſtitution, the foundation for their power to do ſo, was ſought for in an account which they drew up, of the rights of man. When they overthrew their new conſtitution, they found they had been wrong in this account; and they therefore employed another ſet of Sages, to draw up a ſecond; not to mention the ſpreading and moſt pernicious opinion, that becauſe the people are, (what no one can contradict,) the fountain of all power, the people may therefore deſtroy the government which they themſelves erect, as often as they pleaſe, and merely becauſe they pleaſe.

It is aſſerted by one ſet of writers, that we are bound in ALL caſes whatſoever, to ſpeak the truth. By another, it is however permitted to deceive, when a man aſks for information for a bad purpoſe; as in the caſe of a mad or paſſionate man, who aſks you where his enemy is, in order to deſtroy him.

And thus, concerning all, or almoſt all theſe duties, which it is ſuppoſed are enjoined with ſo much certainty and plainneſs by the law of nature, there is a wide difference in the opinions, and a ſtill greater difference in the *deliberate* practices of mankind; from the *uniformity* of which practices alone, they can be ſaid to be *univerſally* binding.

What then are we now to think of thoſe momentous propoſitions of the profound BUTLER and others, which could they be made out with *univerſality* and *truth*, would moſt undoubtedly decide the whole queſtion?—I mean that the *perception* or *principle* of CONSCIENCE, is ſufficient to point out to a man, the moral good or evil which attends every part of his conduct; that obligations to the practice of virtue,

tue, drawn from a review of our nature, are really no more "than appeals to every man's heart, or natural conſcience, in the ſame manner as the external ſenſes are appealed to for the proof of things cognizable by them;" And that if any plain honeſt man, before he engages in any action, were to aſk himſelf whether what he is about to do, is right or wrong, "he would be able to anſwer the queſtion agreeable to virtue and truth in almoſt any circumſtance."

That there is ſuch a perception as CONSCIENCE, and ſuch a feeling as SHAME, cannot be denied; but may we not from what has juſt been related, affirm with ſome degree of reaſon, that they are *mutable*, and vary with the varying ideas of man concerning what is duty; that they are made to depend upon the *prejudices* of his education, or at leaſt cannot be diſtinguiſhed from them, and therefore that they are the mere compunction which he feels for having done ſomething which ſhocks thoſe prejudices? of courſe, that they cannot go the length of forcing ALL mankind to the obſervance of *one particular ſet of morals*, which, it cannot be too often remembered, is the ſole queſtion? (*h*)

In this point of view therefore, the queſtion concerning Conſcience and Shame, (as they are ſuppoſed to enjoin a particular ſcheme of duty,) reſolves itſelf into, and indeed becomes, that other celebrated queſtion of the Moral Senſe, or the "Innate knowledge of right and wrong; concerning the exiſtence

(*h*) They who contenting themſelves with ſuperficial and tranſient views, deduce the difference between good and evil from the *common ſenſe* of mankind, and *certain principles that are born with us*, put the matter upon a very infirm foot. For it is much to be ſuſpected that there are no ſuch *innate* maxims as they pretend, but that the impreſſions of education are miſtaken for them; and beſide that the ſentiments of mankind are *not* ſo uniform and conſtant, as that we may ſafely truſt ſuch an important diſtinction upon them.—Wollaſton. Relig. of Nat. p. 23, 6th Edit.

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of which, it is known that men of the firſt Abilities and Judgment have doubted.

Into this celebrated enquiry, it is not my intention to enter, ſince it would be but a vain expence of time when ſo many perſons of learning competent to ſettle it, (if it could be ſettled,) have failed in drawing any abſolute concluſion upon it.

It will perhaps however be at leaſt ſafe to conclude with an author of deſerved reputation for knowledge in the ſcience of morals,—" Either that there exiſt " no ſuch inſtincts as compoſe what is called the *Mo-* " *ral Senſe*, or that they are not now to be diſtin- " guiſhed from *prejudices* and *habits*; on which ac- " count, they cannot be depended upon in moral " reaſoning." (*i*) Should this concluſion be neareſt the truth, the upholders of the natural law, " as far as it concerns one certain ſet of actions for the whole world," muſt loſe the ſupport which they wiſh to derive from this principle; which indeed, could it be ſatisfactorily made out, would preclude the neceſſity of every ſort of enquiry upon the ſubject.

Upon the whole then, if we conſider mankind as totally independent of the controul of civil inſtitutions, and deſtitute of thoſe ineſtimable advantages concerning the intentions and providence of the Deity, which his goodneſs has *revealed* to us; it would appear that the law of nature, as far as the particular ramifications of morality are concerned, is like the moral ſenſe itſelf. That is, either it does not exiſt at all, or it is ſo confounded with our prejudices, and habits, and peculiar ideas of happineſs; and ſo variouſly made up, according to the various caſts of thought, and the varying perceptions of man, that with reſpect to the obligation in the *Univerſe* to purſue the *particular* duties which it is ſaid to enjoin,

(*i*) Paley's Mor. Phil. B. 1. ch. 5.

nothing

nothing *certain* can be *ſatisfactorily* laid down concerning it.

It is in vain that we are referred to Reaſon, as capable, from its *immutability*, of giving us one certain and never failing rule, by which we may arrive at the binding principle. We have already obſerved, that although the laws by which reaſon works are *immutable*, yet unleſs the *premiſes* are ſettled, nothing can be made out by them; and if the foregoing account of the actions of man when left to himſelf, is thought ſufficient to prove him a being whoſe nature cannot be diſcovered, with any great degree of certainty, to impel him invariably to the obſervance of *one certain Syſtem*; it will follow that the laws of reaſon themſelves will not enable us to make out the point, any more than CONSCIENCE, or the mere conſultation of our hearts and feelings; the great proof of which is to be diſcovered, in that multiplicity of diſcordant theories, (all of them equally attempted to be made out by reaſon) which has already been laid before the reader. (*k*)

And this may alſo ſerve as an anſwer to very many triumphant aſſertions that have been made concerning the power of reaſon; which can only be aſcribed to the miſtake of thoſe who make them, in not ſeeing that even for REASON to diſcover any truth, it is neceſſary that the truth of the *premiſes* ſhould be already allowed.

Hence therefore, when BURLEMAQUI affirms as he does, (*l*) that many reaſonings and cuſtoms which

(*k*) Puffend. 2. 3. 20. has the following paſſage, La Raiſon n'eſt pas à proprement parler, la Loi Naturelle, mais ſeulement un moien de la connoitre, ſi nous le mettons en uſage, comme il faut. Now who is to anſwer for what is *comme il faut?* Montaigne goes into the other extreme, (Eſſais. l. 2. ch. 12.) And Wollaſton confeſſes that in this talk concerning *right reaſon*, room is left for many diſputes and *oppoſite right reaſons*, and nothing can be ſettled while every one pretends that *his* reaſon is right.—Relig. of Nat. p. 23.

(*l*) Burlemaq. Du. D. Nat. 2. 6. 8.

appear

appear adverſe to *his own ſyſtem*, are mere deviations from the right rule; he does not conſider that thoſe very reaſonings and cuſtoms muſt be conſulted, in order to aſcertain what the right rule is.

BARBEYRAC falls into the ſame miſtake, though he aſſumes a more regular appearance of argument, when he ſays that particular tribes of men may be compared to the ſervants of a maſter going a journey, who leaves certain orders with thoſe ſervants, eaſy to be underſtood and to be executed, but which they do not obey. In which caſe, ſays he, they may afterwards fall into great diſorders from the want of conſulting them, and although they may have every good wiſh to do what is right, ſtill they are not leſs liable to be blamed, nor leſs worthy of puniſhment upon his return. (*m*) In this illuſtration the point in queſtion is aſſumed. Since the difficulty is to diſcover what the orders of our maſter may mean, even *after* having conſulted them; and the very circumſtance of our confuſion proves that they may be miſunderſtood. It is equally aſſumed by him in another place, where he ſays that men of underſtanding have *abuſed* their leiſure and talents, in broaching doubtful points. (*n*)

Hitherto we have viewed the nature of man apart from all conſiderations of religion whatſoever; not merely from thoſe *revelations* which God in his bounty has beſtowed upon the world; but thoſe *general* ſentiments of a deity, which compoſe what is commonly called *natural* religion.

And we had good reaſon to do this; ſince two of the weightieſt writers upon our ſubject have ſuppoſed, that all the duties, the obligation of which we are examining, are commanded by the law of nature, and are therefore binding upon ALL men, " even

(*m*) Barbeyr. Pref. to Puffend. p. 14.
(*n*) Barbeyr. Pref. to Puffend. p. 17.

though

though they ſhould be impious enough to deny the very exiſtence of a deity." (*o*)

Graver conſiderations however preſent themſelves now for diſcuſſion. The difficulty, not to ſay impoſſibility, of deriving any particular ſyſtem of morals, (obligatory upon ALL) from *natural feelings* alone, or the dictates of reaſon occupied merely in analyſing thoſe feelings; has induced the greater number of writers to wave the point of a *total* want of religion, and to admit that the idea of a Deity muſt enter into the compoſition of the law of nature, in order to render it binding. Thus it is confeſſed, that however clear the dictates of reaſon may appear, there is no obligation upon man to comply with them, without having recourſe to ſomething higher. (*p*)

An important and very reaſonable theory is therefore ſet out, (the effect ſometimes of moſt profound deductions,) by which it is held, that the obligation in queſtion ariſes from GOD himſelf; who in quality of Creator and Conductor of human nature, *preſcribes* to man with *authority*, the obſervance of the law. (*q*) Being the author, it is ſaid, of nature and reaſon, whatever is commanded or forbidden by *him*; not that he is ſuppoſed ab initio to have revealed himſelf ſenſibly to the world, or to have pronounced

(*o*) Vide ut ſup. Vattel Prelim. Sec. 7. & Grotius, D. J. B. P. Prolegom. 11.

(*p*) Cependant pour donner force de loi aux maximes de la raiſon que nous avons etablies, il faut, comme je l'ai dit, ſuppoſer ici un principe *plus releve*. En effet, quoique leur utilité ſoit de la derniére évidence, cette conſideration ſeul, ne ſervit pas aſſez forte pour convaincre l'homme qu'il eſt dans une néceſſité indiſpenſable de les partiquer, toutes les fois qu'il voudroit renoncer aux avantages qui reviennent de leur obſervation, ou qu'il croiroit avoir en main, des moiens plus propres à avancer ſes intérêts. (Vide Barbeyrac's Puffend l. 2. ch. 3. Sec. 20.) Again, Sans la Divinité, on ne voit rien qui impoſe un neceſſité indiſpenſable d'agir, ou de ne pas agir d'une certaine maniere. Preſ. 23.

(*q*) Il faut donc neceſſairement poſer pour principe, que *l'obligation* de la loi naturelle vient de *Dieu* même, &c. Id. Ib.

certain

certain things to be good and others to be bad, and to have commanded the one and forbidden the other, in *the declared quality of* LEGISLATOR; but merely, and by inference, as the author and governor of nature. (*r*) All this is made manifeſt, they affirm, by reaſon alone; and not only this, but the end he propoſed to himſelf in the creation of the world is demonſtrated, *through the ſame medium*, to be his own GLORY, as well as the happineſs of men; which glory they go on to ſay, conſiſts in manifeſting his perfections, his power, his goodneſs, his wiſdom and his juſtice. (*s*) Thus there is no occaſion for a particular REVELATION to enforce the law; ſince it is indifferent whether God clothes himſelf in a human form, and pronounces it with his own mouth; or makes uſe of the intervention of ſome inſpired perſon; " or merely contents himſelf with diſcovering his will in the ſimple precepts of right reaſon."

(*r*) Grotius (D. J. B. P. 1. 1. 10. 1.) makes Natural law to flow from God as the *Auctor* Naturæ; and this ſentiment was broached long before him by SUAREZ in the following paſſages: Ergo ſine dubio, Deus *Effector*, et quaſi *Doctor* legis naturalis. Non tamen inde ſequitur, ut ſit Legiſlator. quia Lex Naturæ, non indicat Deum ut præcipientem; ſed indicat quid in ſe bonum et malum, ſicut viſio talis objecti, indicat illud eſſe album aut nigrum. Et ut effectus Dei, indicat Deum ut Auctorem, non tamen ut Legiſlatorem; ergo conſendum erit de lege naturali.—De Leg. ac Deo Legiſlat. l. 2. c. 6. Sec. 2.

Again. Legem naturalem omnino poſitam eſſe in divino imperio, vel prohibitione, procedente a voluntate dei, ut Autore et Gubernatore, &c. Id. Sec. 4.

See alſo the whole of Cap. 6. l. 2. of Suarez, where he conſiders the queſtion An lex naturalis, ſit vere lex divina præceptiva?

(*s*) La fin que Dieu s'eſt propoſée par rapport à ſes Creatures, et en particulier par rapport à l'homme, ne peut etre, d'un coté que ſa Gloire, et de l'autre, que la *perfection* et le bonheur de ſes créatures, autant que leur Nature ou leur Conſtitution les en rend capables. Ces deux vues ſi dignes du Créateur, ſe combinent, et ſe réuniſſent parfaitment. Car la Gloire de Dieu conſiſte à manifeſter ſes *perfections*, Sa *Puiſſance*, Sa *Bonté*, Sa *Sageſſe* et Sa Juſtice.—Burlem. Du D. Nat. 2. 2. 3.

Nay

(*t*) Nay farther, although all the world ſhould not be able to make out theſe precepts, ſtill, it is held, that all the world are not the leſs bound to obſerve them. (*u*)

To this reaſoning however, (if it is meant to go the length of obliging *all* mankind to the obſervance of one particular ſet of moral actions,) the ſame arguments are applicable, as were applied to the theory of an uniformity of perceptions and feelings.—For if the *fact* actually is, that mankind do *not* agree in all theſe particular deductions reſpecting natural religion, it cannot be expected that the obligation derived from that religion to obey one particular moral ſyſtem, is to be *univerſal*:—And I am free to own, that what is aſſerted, is above my comprehenſion, that although theſe deductions are not to be made out by every one, ſtill, that every one is bound to act as if they were. For it is thus ſuppoſed in the ſame breath, that religion is only to be made out by reaſon; and yet that if it is not ſo made out, it ſhall ſtill exiſt in all its authority.

That there is ſuch a thing as religion, diſtinct from REVELATION, few indeed can venture to diſbelieve. That *all*, or nearly *all* perſons have thought *alike* of it, is too plainly againſt experience to need much proof.—Yet it ſhould be demonſtrated that all, or nearly all, have had the *ſame* ideas of it, before any uſe can be made of it to ſhew that the obligation upon *all* to obſerve one *particular* and *certain* ſet of duties, can be derived from it.

(*t*) Puffend. l. 2. C. 3. Sec. 20.

(*u*) Mais que qu'une Loi pour avoir force d'obliger, doive neceſſairement etre notifiée à ceux qui dépendent du Légiſlateur; & que tout le monde de ſoit pas capable de découvrir le véritable fondement des loix naturelles, et la liaiſon neceſſaire tu'elles ont avec la nature humaine, ni de les deduire methodiquement des principes de la raiſon: *Elles ne laiſſent pas pour cela d'obliger tous les hommes*; &c. Puffend. Ib.

Now

Now it is of no conſequence to be able to demonſtrate *to ourſelves*, the abſurdities of all religious notions oppoſite to our own. That demonſtration will have the effect of producing obligation upon *us*; but can never impoſe an obligation upon others who do not, or can not ſee the force of it; and ſhould others, ſetting out from different premiſes, arrive at different or oppoſite concluſions; there will be an equal obligation upon *them*, to the performance of things directly oppoſite to what we conceive it a duty to practice *ourſelves*. In vain therefore is it ſaid, or demonſtrated ever ſo plainly, to their own ſatisfactions by particular men, that there can be but one notion of a Deity, if ſuch a propoſition of their being *ſeveral* notions of it, to the *whole* of mankind; ſince (according to our old obſervation) it is *fact* alone which muſt determine that point. Speaking accurately, we may fairly ſay that among CHRISTIANS, or perſons who ſee elementary things in the ſame point of view, there muſt be a conformity; but whether that conformity muſt be *univerſal*, among all mankind, whether Chriſtians or not, we can only determine by analyſis, (if I may ſo ſay,) that is, ſimply by examining the fact, whether Men *univerſally* ſee elementary things in the ſame point of view. (*w*)

Thoſe who have made this examination, are not to be told the immenſe diverſity of ſentiment to be found upon this moſt intereſting ſubject: and whether we take the uniform difference between ſavage and civilized life; or the difference between the notions of civilized men themſelves; we ſhall find there is nothing ſo diſtant from conformity, as the opinions which we ſhall there be able to diſcover.

(*w*) It is the ſame argument with that which holds the neceſſity for an uniformity of premiſes, in order for Reaſon to work in one and the ſame manner.

The

The naked and ſolitary Indian, who had beheld and reverenced the courſe of the Sun and Moon; had trembled at the lightning, and liſtened fearfully to the ſtorm; though he might be convinced there was ſome Power in the univerſe far ſuperior to his own, could hardly arrive at thoſe concluſions concerning the *intentions*, the *bounty* and the *juſtice* of providence, which are ſuppoſed by the argument to flow from nature alone; for leſs would he, or does he imagine, that he is bound to obſerve thoſe actions which *civilized* men call moral, by the abſolute commands of a Deity, of whom he is known to have had ſuch groteſque, and often ſuch horrid ideas.

Now according to the whole tenor of the foregoing arguments, we ſay it is fair to ſuppoſe that UNCIVILIZED, as well as CIVILIZED nations believe the religious notions which inſpire them, to be the dictates of their nature; and although CIVILIZED reaſon ſhould demonſtrate, ever ſo much to its *own* ſatisfaction, that UNCIVILIZED minds are wrong in their ideas; yet unleſs the latter agree that they are wrong, nothing ſatisfactory can be determined.

The atrocities and diſguſting practices that every where take place under the notion of religion, among nations that are held to be UNCIVILIZED, are too notorious to need much deſcant.

It is ſufficient to obſerve, that if religion *diſtinct from Revelation*, is ſuppoſed to enforce the duties of brotherly love; of univerſal philanthrophy; the preſervation of our lives; and the general peace, and good order of mankind; it is well known that the religion of men in certain ſituations, has almoſt uniformly produced the very reverſe of all theſe. The neceſſity of dying violent deaths in battle; (*x*)

(*x*) The religious duty of all the Scandinavian Anceſtors, whoſe paradiſe could only be obtained by ſuch means. Vide infr. chap. vii.

or upon the tombs of relatives or maſters; (*y*) the immolation of captives and ſtrangers to Gods known, and unknown; the ſlaughter of fellow-creatures to the means of friends; the offering of our very children, and that in a manner the moſt horrid and barbarous (*z*); the moſt ſhameleſs violations of decency;

(*y*) The cuſtom of the Indian Widows already taken notice of: Of the Inhabitants of Agag, in Africa, the wives of whoſe king are all forced to poiſon themſelves upon his death. (Picart. Cerem. Relig. 4. 495.) of the Floridans who buried Slaves with their Maſters. Id. 3. 133. and of great variety of others, particularly the African Nations, as is well known.

(*z*) The Macaraguans, the Mexicans, the Peruvians and Formoſans, ſacrificed all their priſoners of war. (Picart. 3. 147. 168. 4. 173.) At Campeachy the Spaniards, when they viſited it, found Idols of horrid ſhapes, and near them ſeveral dead bodies newly ſacrificed. (Conq. of Mex.) The antient Marcellois uſed even to pamper their victims for a whole year, in order to fatten them before they ſacrificed them. (Pic. 3. 148.) The Inhabitants of Tanchuth had a Goddeſs whom they called Manipa, who had nine heads, and to whoſe honour, on certain days of the year, a ſtout young man uſed to ſally forth into the ſtreets and kill every one he met, and their bleeding bodies were immediately borne an offering to this terrible deity. Ariſtomenes, the Meſſenian, ſacrificed three hundred Spartans together, with their king Theopompus, to Jupiter of Ithome. The bloody ſacrifice made by Achilles to the manes of Patroclus, muſt be well remembered: Even the wiſe Themiſtocles offered ſacrifice of Perſian Captives to obtain ſucceſs againſt that nation. The Carthaginians it is well known uſed to offer their Children to Saturn, by placing them on the hands of the Idol, which by being inclined downwards let them roll into a burning furnace below. Bacchus had an altar in Arcadia, upon which young Damſels were beaten to death. The Mexicans adored an Idol made of all the ſeeds of the earth, kneaded with the blood of young children, whoſe hearts were torn out of their bodies and offered as an acceptable gift to the Idol thus made. (Pic. 3. 147.) They had alſo a Goddeſs called *Tozi*, whoſe abſurd hiſtory is, that ſhe was deifyed by their great God *Vitzliputzli*, who made them firſt demand her of her father as Queen; ſhe was then put to death, and flayed, and a young man covered with her ſkin, and thus being tranſlated from Earth to Heaven, demanded the cruelleſt ſacrifices; namely, human Creatures. (Conq. of Mex.) When the corn began to ſpring

cy; (*a*) are the characteriſtic barbarities of the Pagan religions.

It is ſaid however, that theſe are either degeneracies and corruptions of our reaſon; or the notions of men who have never improved their faculties by the advantage of civilization, which if they had poſſeſſed, it is affirmed they would have thought as we do: (*b*)

ſpring among theſe people, they ſacrificed a boy and a girl to *Tlalock*, the God of the Waters. When it was two feet high, four children; when they entered the great lake on a feſtival, a boy and a girl were drowned in honour of it; (Pic. 3. 154.) and when they went to war, five boys and as many girls, three years old, were offered to their God Quitzalcoalt. (Brought. voc. Quitzalcoalt.) In theſe cruel ſacrifices of children, they were imitated by their neighhours the *Peruvians*. (Pic. 3. 188.) and the ſame cuſtom was purſued by the *Formoſans*, who believed that the ſouls of the wicked paſſed into Dæmons, whom they were bound to implore with ſacrifice and ſupplication, the former of which conſiſted often of Infants. (Deſcrip. of Formos. ch. v. 17.) The Oſtiacs, a ſet of Tartars, worſhipped what they called the old Man of Oby, to whom when they went a fiſhing they offered prayers for ſucceſs: but if they failed, they ſtripped him naked, whipped him, and threw him into the dirt as an old, impotent, deſpicable God. (Brought. voc. Oby.)

(*a*) The Prieſteſſes of Formoſa, after devout prayer, uſed to ſtrip themſelves naked on the top of the Pagoda, and put on the moſt laſcivious geſtures, in order the better to allure their Gods to hear them. (Pic. 4. 270. Brought. Hiſt. of Relig. voc. Juibas.) The Houames, a religious ſect of the Arabians, after prayers in their tents at night, uſed to cohabit in the dark with the firſt perſon they met, whether father, mother, brother or ſiſter. (Ricaut. Hiſt. of Ott. Emp. and Thevenot's Travels.) The Moabites and Midionites, people far from a ſtate of Savagiſm, were reproached with worſhipping the famous Idol Baal-Phegor (to whom even Solomon erected an Altar,) in a manner ſo diſguſting "eo quod diſtendebant coram eo foramen "podicis, & "ſtercus offerebant." (Broughton. voc. Baal. Pheg.)

(*b*) Dira-t-on que ce fuſſent la des loix du Droit des Gens, qui obligaſſent véritablement les Nations? Il faut plutôt les regarder comme des pratiques, barbares, bont toute Nation juſte et *bien policée* doit s'abſtenir. (Burlemaq. Du D. Nat. 2. 6. 8.)

For

For a moment let it be ſo, and the point we labour at is therefore accompliſhed. For when we talk of the world we ſhall then only mean the *civilized* world; and not only that, but the world civilized after our own ideas; ſince many of the examples quoted, are taken from nations comparatively advanced in improvement. Thus, a difference is made between two parts of mankind; and what we held is found to be true, that it was an inaccuracy to ſay the laws in queſtion "as far as they related to a "particular ſyſtem," were binding upon ALL.

But I fear we cannot ſtop here, ſince even if we confine ourſelves to what we call CIVILIZED life; we ſhall find as much diverſity in the opinions of men who have dedicated their lives to the cultivation of their reaſon and the ſtudy of mankind by travel and meditation, as between the notions of ſavagiſm and refinement.

The learned reader is not to be told the various abſurdities, the imaginary viſions, and the ſometimes impious opinions, that have been ſent abroad under the form of Theories of Religion, by all thoſe who have lived, or live without the benefit of REVELATION.

One ſet of the antient Philoſophers, believed the world to have been formed by the Gods after much labour. Another by the fortuitous concourſe of atoms. The one truſted in a certain providence, that was always at work for the protection of the wiſe: The other, that the Gods, if there were any, gave themſelves no trouble about mankind, but buſied themſelves ſolely with their own pleaſures. A third ſet, upheld the doctrine of neceſſity and predeſtination, which renders all care about our actions uſeleſs. A fourth conceived the tranſmigration of ſouls; and almoſt all concurred in a plurality of deities, the licentiouſneſs of whoſe manners, and whoſe violent and human paſſions, muſt have generated

generated ideas of them, which it is not more abſurd to imagine of an all wiſe and juſt Deity, than they would be incapable of producing any good effect upon morals.

Whole tribes have been known, as well civilized as uncivilized, to have no idea of God or Religion at all; as the Inhabitants of Soldania in Brazil; of Boranda, and the Caribbee Iſlands, and the great Sect calling themſelves by way of diſtinction the *Learned* among the Chineſe; a circumſtance much dwelt upon by Mr. Locke, to prove the non-exiſtence of Innate ideas. (*c*) In the Empire of Japan there is a religion called the Sinto Religion, the followers of which place their whole happineſs in preſent and ſenſual enjoyments. (*d*) The Turlupins, an infamous Sect of the fourteenth century in France, ſeemed to imitate the conduct of the antient Cynics, in holding that they ought not to be aſhamed of publicity in the performance of what was enjoined by nature: they alſo taught that they were arrived at a ſtate of perfection, and were freed from all ſubjection to divine law. (*e*)

One proportion of mankind believe in a principle of good, another in a principle of evil. (*f*)

The firſt imagine every thing is for the beſt; the laſt that we are born to be miſerable. The Egyptians (a cultivated people) worſhipped almoſt as

(*c*) Eſſ. on Hum. Und. B. 1. ch 4. Sec. 8. It is right however to mention that modern diſcoveries affirm the *Literati* of China to be Theiſts.

(*d*) Broughton. voc. Sintoiſts.

(*e*) See Mezerai. ch. 5.

(*f*) The doctrine taught by the Manichæans; (Bayle voc. Manes)—and the Magi of the Perſians; the latter of whom characterized the two principles under their famous Gods Oromaſdes and Arimanius. (Broughton. Hiſt. of Relig. voc. Magi.) Oromaſdes was ſuppoſed to have created the other, merely becauſe, having no one to oppoſe him, he could acquire no glory. (Id. voc. Arim.)

many Gods as there were Animals. Many other nations of Africa pay Divine Adorations to Serpents; many of them to the Devil. The Perſians worſhipped Fire, the Egyptians Water. (*g*)

In *Formoſa* it is thought contrary to religion, and the law of nature, for women to bear children before ſix and thirty. Yet they are abſurdly allowed to marry, and if they prove pregnant they apply to a prieſteſs who violently brings away the fœtus. (*h*) The *Armenians* worſhipped a Goddeſs called *Anaitis*, to whom the daughters of the greateſt men of the Country were dedicated, who as the greateſt honour they could pay to her, proſtituted themſelves to all thoſe who came to offer ſacrifice; after which they were eagerly courted in marriage as having acquired extraordinary ſanctity. (*i*) The *Mozdarians*, a Sect of the Mahometans, held the impious doctrine that God could even be a liar and unjuſt; (*k*) And the Chriſtians themſelves, whenever they have departed from the plain precepts of the Goſpel, have degenerated into doctrines equally abſurd, and fatal to morality. Thus, the *Priſcillianiſts* in the fourth century, held the principle of Evil with the *Manichæans*, and that it was lawful to take falſe oaths in

(*g*) The God of their Waters was *Canopus*, concerning whom a ridiculous legend is extant. The Chaldæans upholding the ſuperiority of their God Fire above all other Gods, the proof of which they deduced from uniform power of fire to deſtroy every thing thrown into it; an Ægyptian Prieſt made an Idol of Canopus with a large earthen belly pierced full of holes, which were ſtopped with wax, and the Image filled with water. A conteſt with the God of the Chaldeans was demanded the Image: was thrown into the fire, which as it melted the wax, let out the water and was extinguiſhed, to the great triumph of Canopus, whoſe fame was inſtantly bruited through all the adjacent countries. (Soidas voc. κανωπος—& Picart, 3. 231.

(*h*) Picart. 4. 276. 7.

(*i*) Brought. Hiſt. of Relig. voc. Anaitis.

(*k*) Id. voc. Mozdar.

ſupport

ſupport of our intereſts. (*l*) The *Ophites*, in the ſecond century, imagined Chriſt to have been the Serpent that tempted Eve, and therefore paid adorations to a Serpent in adminiſtering the ſacrament, as well as to Seven Dæmons whom they were reproached with worſhipping. (*m*) The *Gnoſtics* (the very etymology of whoſe name ſignifies *enlightened*,) denied the world to come; held the two principles of good and evil, and a difference between God and the Creator of the world. (*n*) The *Simonians*, the followers of Magus, denied the reſurrection of the body, and with the *Gnoſtics* and Nicolaitans allowed the promiſcuous uſe of women.

Laſtly, within our own view, the Legiſlators of millions in a neighbouring nation, when they reſolved to carry the dictates of reaſon with reſpect to religion (according to *their* ideas of them as far as they would go; ended in aboliſhing all notions of a future life, or of a divine moral Agent. They did the firſt, by voting that Death was an eternal ſleep; by which they renounced the immortality of the ſoul: They did the laſt, by voting that nature alone ſhould be the object of their worſhip, by which they renounced their allegiance to any ſort of Deity at all.

And thus, under the notion of religion taught by nature and reaſon, (and even after we have received the light of the Goſpel, if we degenerate from it,) there is nothing ſo abſurd, ſo uncouth, or ſo wicked, as not to find ſupport ſome where in the world, either in the civilized or uncivilized part of it. And hence my Lord *Shafſbtury*, at the ſame time that he contends very ſtrenuouſly for natural virtue

(*l*) Priſcillian was ordained a biſhop (of Avila) and became formidable. (Baron. Ann. 381.)

(*m*) Brought voc. Oph.

(*n*) Id. voc. Gnoſt.

as forming part of our Syſtem, is obliged to own that a *falſe* religion wherein the character of the Deity is evil, will make EVIL to be conſidered as GOOD. (*o*) However clearly therefore we may be able to demonſtrate the truth of our own ſyſtem, upon principles even drawn from natural law, the force of which is evident to us; I cannot conceive how it can follow, if thoſe principles are not allowed by all the world, that all the world ſhall be bound to ſubmit to them as if they were. Natural religion therefore can do as little towards enforcing the obligation upon ALL, to purſue one particular ſyſtem of conduct, as natural feelings or conſcience; ſince neither the one nor the other prevail in ſufficient *univerſality*, to warrant the aſſertion that the whole world are bound by them in the ſame way. We may therefore not unreaſonably make uſe of the ſame argument againſt NATURAL Religion, diſtinct from REVELATION; as that which has been uſed againſt NATURAL MORALITY, diſtinct from natural religion. Some of our antagoniſts themſelves allow that morality without religion is nothing but a houſe built upon the ſand; (*p*) and are forced to own the inefficacy of Pagan religion, when with an antient father of the Church, they complain that it made an illegitimate ſeparation between morals and divine worſhip; between mere miniſters of ceremonies, and the teachers of wiſdom. (*q*)

Now then, let any man ſet himſelf to examine what may be meant by that which is uſually called MORALS, if conſidered as independent of revealed religion; and he will probably find, that it does

(*o*) Inquiry concerning Virtue. 51.

(*p*) Mais faites les plus beau Syſteme du Monde, ſi la Religion n-y-entre pour rien, ce ne ſera guerres, pour ainſi dire, qu'une Morale Speculative, vous baterez ſur le Sable.—Barbeyr. Pref. to Puffend. 23.

(*q*) Id. Ib.

not

not mean merely *one* certain mode of action, as practiſed by particular men; but any ſet of actions, which any claſs of men may chuſe to deviſe, provided they do not take their riſe from licentiouſneſs, or abſolute will, or caprice; but from regular principles, followed up by practice. So that even though one claſs of men ſhould be able to prove to themſelves, that the principles aſſumed by another claſs are falſe; yet if they cannot prove it to the ſatisfaction of the latter, the latter are not the leſs bound to continue to obſerve them.

And this will be evident to any one who conſiders the original meaning of the term morals, or MORES; which is nothing more nor leſs than CUSTOM, PRACTICE, ACTION; proceeding upon ſome *known* rule or inſtitute. (r)

The Inſtitute itſelf is indeed UNIVERSALLY intended to produce the happineſs, or in other words, the GOOD of thoſe who purſue it; becauſe the hiſtory of man proves to us, that he propoſes *happineſs* or *good*, as the end of all his Conſtitutions; but what the character of the Inſtitute ſhall be; that is, "what particular actions ſhall be forbidden, and what enjoined"; will depend upon the varying ideas of happineſs, or good, in thoſe that form it.—That happineſs is the ſame thing as what is ſo well known under the name of the SUMMUM BONUM; and it has been well defined to be, "a thing which is deſir-
"able; not for ſomething elſe, but for itſelf; that is,
"it is the end to obtain which, every thing that is
"done or commanded, is but as the means. The
"Sportſman believes there is good in the chace;
"the man of Gaiety in his intrigue; even the
"Glutton in his meal. We may juſtly aſk of
"theſe, why they purſue ſuch things? but if they
"anſwer, they purſue them becauſe they are GOOD;

(r) Geſner. Theſ. Ling. Rom. voc. Mores.

"it

" it would be folly to aſk them farther, why they " purſue what is GOOD? It would ſeem then, the " grand queſtion was, what was GOOD? For whe- " ther it be the intrigue, or the chace, or the meal, " may be fairly queſtioned, ſince men in each in- " ſtance are far from being agreed." (*s*)

Such is the opinion of a writer, of no ſmall fame for clearneſs of intellect; and upon the ſuppoſition that his opinion is juſt, we may carry the principle it contains, from individuals to Nations; and although we may diſcover that the end propoſed by the laws, maxims, and cuſtoms, of different races of people are very different from one another, we may be warranted in obſerving that all of them while independent of one binding Religion, are equally Moral, ſo long as they bona fide believe that GOOD is their end. Hence therefore, the morality of any particular ſet of actions is not impugned, becauſe they are objects of horror and deteſtation to people purſuing another ſet; and thoſe of mankind who have not had the advantage of one common religion, or one common code of laws, to preſcribe to them with AUTHORITY; may, and do often tear one another to pieces, equally and alike upon principle, and the purſuit of what, abſtractedly conſidered, is RIGHT. For RIGHT in general terms, to uſe the language of one of the moſt ſenſible expounders of the Science before us, " is nothing more than conformity " to the rule we go by, whatever that rule may " be." (*t*)

" VIRTUE," ſays another reſpectable authority, " is the conformity to a rule of life, directing the " actions of all rational creatures with reſpect to " each other's happineſs; to which conformity eve- " ry one is in all caſes obliged:" (*u*) But granting,

(*s*) Harris Hermes. p. 297. 3d Edit.
(*t*) Payley, Mor. Phil. B. 2. ch. 1.
(*u*) Bp. Law's Pref. to King on the Orig. of Evil.

what

what cannot be denied, the obligation to conform to the rule *once eſtabliſhed*; ſtill, what the rule ſhall be, is left unſettled; and the obligation upon all, to obſerve one particular conduct, remains floating in as much uncertainty as ever. For we cannot too often obſerve, that the conteſt all the way through, is not ſo much to determine *how* obligation to obey a *particular* code is produced; as to ſhew that there may be *various* codes, according to the varying ideas of men; a poſition which ſeems to be allowed in another work, by the laſt mentioned author himſelf, when after having taken notice of the diſparity between the abilities, tempers, opportunities, ſituations in the world, or governments under which they live, which is to be found in different men; he emphatically adds, "To ſpeak therefore of *one, fixed*, "*immutable*, and *univerſal* law of nature, is framing "an imaginary ſcheme without the leaſt foundation "in the nature of things, directly contrary to the "preſent order of the WHOLE CREATION." (*w*)

(*w*) Conſiderat. on the Theor. of Religion. p. 4. "Virtue," ſays Archdeacon Paley, "is the doing good to mankind. in obe-"dience to the will of God and for the ſake of everlaſting hap-"pineſs." Mor. Phil. B. 1. ch. 7.) This definition is thoroughly ſound. But the hope of everlaſting happineſs can be made out with certainty, only by revealed religion. Nor can there be any other motive from Nature alone, ſufficient to oblige us to virtue, *ſhould we not be inclined to it*, unleſs it were ſhewn, (which never has been done,) that virtue is not only the beſt means of obtaining Happineſs, but is in fact the ſame thing with it. The definition is no where incompatible with our Syſtem, and in part ſupports it.

CHAP.

CHAP. III.

FOUNDATION OF THE LAW OF NATIONS.

AND thus from any thing we have yet ſeen, neither natural CONSCIENCE, nor even RELIGION, conſidered a-part from REVELATION, are able to produce that *certain*, *univerſal*, and *immutable* ſcheme of duties, which we muſt ſuppoſe to be acknowledged by the whole univerſe, before we can make out from natural law alone, the particulars of what is meant by the definition of the Law of Nations, which we conſidered in the beginning of the laſt Chapter. *(a)*

It was in mercy to mankind, divided, led aſtray, and afflicted with theſe diſcordant ideas concerning the only thing, which if they all thought alike of it, would indeed force them to conſider one another as brethren: it was to remedy, either the inefficacy of the natural law to produce a *general* and uniform virtue; or the total loſs of the law itſelf; that, that high and glorious gift contained in the CHRISTIAN diſpenſation was beſtowed upon the world.

By this, more certain indications of the power, and attributes of the Creator were given to men.

Their duty was ſet before them with preciſion, and ſimplicity; and above all, reaſons for it were aſſigned, which, where they are allowed, muſt put an end to all doubt, and carry obligation to the moſt ignorant mind.

The very exiſtence of this diſpenſation, proves to us, I think, the want of power in the ſyſtem called

(*a*) Of Preſident Monteſquieu.

the

the law of nature, to enforce thoſe moral duties in all their univerſality, for the univerſality of which ſo much is contended.—For why, might it be aſked, was this wonderful revelation bellowed upon mankind, with all its ſplendid train of miracles, and martyrdoms, and the long continuation of the divine interpoſition, which has afforded ſo many handles for *Infidelity* to lay hold of; if every thing which it was meant to bring about with reſpect to Morals, could have been done without it? Why alſo that complaint which with the greateſt juſtice is in every body's mouth, that if Religion were baniſhed, the whole people would be corrupted; the practical truth of which is brought home to our own times in melancholy force, from the contemplation of what has paſſed among the French; and the conſideration that nearly all thoſe amongſt ourſelves who ſeek to diſturb the peaceful order of things, are profeſſed Deiſts, or followers of Reaſon; that is, whoſe moral principles can ſeldom be fixed or generally underſtood.

Now although very refined Intellect, attended with the advantages of much leiſure and meditation, has ſometimes been able to form a very virtuous ſyſtem of morals; and one or two were formerly able to make out ſomething like the doctrine of rewards and puniſhments; yet it was ſo enveloped in obſcurity, and ſo fragile, from inſufficient elementary principles, that the *generality* of men could not enter into them, becauſe they could not feel their force; and the generality of men can not be ſuppoſed to be bound by laws which they do not underſtand. Whereas there is this invariable advantage which the meaneſt Chriſtian has over many of the proudeſt Philoſophers; that he can immediately ſet forth the plaineſt, and at the ſame time, the moſt forcible motives for living a life of virtue; while the latter is often

often loſt in paradoxes, or forced to deduce his conſequences from poſitions of his own aſſuming. (*b*)

It may be ſaid, and with great reaſon, that according to our own principles, the laws of Chriſtianity

(*b*) The moſt exalted ſtate of human reaſon, ſays Dr. Middleton, is ſo far from ſuperſeding the uſe, that it demonſtrates the benefit of a *more explicit* REVELATION. For though the natural law, in the perfection to which it was carried by Cicero, might ſerve for a ſufficient guide to the few, ſuch as himſelf, of enlarged minds, and happy diſpoſitions; yet it has been ſo long depraved and adulterated by the prevaling errors and vices of mankind, that it was not diſcoverable *even to thoſe few*, without great pains and ſtudy, and could not produce in them *at laſt*, any thing more than a *hope*, never to *full perſuaſion*; whilſt the greateſt part of mankind, *even of the virtuous and inquiſitive*, lived without the knowledge of God or the expectation of a Futurity. Middlet. Life of Cicer. 2. 562. note x. Quarto.

The neceſſity for revelation to minds that are not able to make out the law by reaſon, is alſo acknowledged, as it were in ſpite of themſelves, by Suarez and Puffendorf, thoſe great ſupporters of the contrary opinion. (Suarez De leg. ac Deo. legiſl. L. 2. C. 4. S. 9. and Puffen 2. 3. 20.) The latter there confeſſes that there is ſome reaſon to imagine that God himſelf *taught* the primitive men the chief heads of the law, which were afterwards ſpread and preſerved by Education. Thoſe indeed who do not attribute ſo much as Lord Kaims to the brute ignorance which the Syſtem of the State of Nature ſuppoſes, may reaſonably believe in the Creed of our fathers, and imagine that

> . . . . . God or Angel Gueſt,
> With Man as with his friend, familiar uſed
> To ſit indulgent.

If ſo, a fair queſtion may be raiſed, whether *all* religion was not originally revealed. (See a little tract written by Dr. Doeg, entitled Letters on the Savage State, and addreſſed to Lord Kaims.) A doubt is there not unreaſonably ſtarted, whether it is even poſſible for *Savagiſm* to improve, *if left to itſelf*. Bp. Butler himſelf in another work allows, that Natural Religion before Revelation, was ſo clogged with Superſtition, "that it was totally corrupted, and in a manner loſt." (Analog. Part II. Ch. 1.) Now the imperfection of Natural Law, or Natural Religion, *as the foundation of any other law*, is equally manifeſt, whether we ſay that there is really no ſuch thing; (which we do not pretend to affirm;) or that it is not to be made out in ſufficient clearneſs, while ſo foul and obſcured with prejudice and ſuperſtition.

itſelf

itſelf are not binding upon thoſe who have never received them. We agree to that propoſition, and it is our very point that we ſhould do ſo; ſince we obſerved in the beginning, that if the Natural law was not diſcoverable with exactneſs; if it ſhould prove to be little underſtood, or ſo incruſted with prejudices or ignorance, that we could not come at it with any certainty; we muſt content ourſelves with ſuch a ſort of obligation, and ſuch a plan of conduct, as different *claſſes* of nations adopt, according to their different Religions or Syſtems of Morality. When theſe are known, whether they are Chriſtian, or Mahometan, or Pagan, we may give a tolerable gueſs at the Spirit of the Character of the people, and the genius of thoſe laws which govern their intercourſe. When they are not mentioned; and we content ourſelves with aſſerting a particular, and ramified duty, *becauſe recommended by the laws of nature and reaſon*, we cannot ſufficiently depend upon them to be ſure of the power of their obligation, or that the preciſe conduct recommended is in reality binding.

By ſhewing therefore the neceſſity and the ſuperiority of the Chriſtian Revelation, we meant ſimply to point out, the impoſſibility of the law of Nature to carry with it an obligation to purſue thoſe duties, which are in general only obſerved under the obligations impoſed by CHRISTIANITY; not to aſſert that the latter obligations extended themſelves to all mankind, even to thoſe who were ignorant of them.

Whence then are we to derive the origin of that obligation which is ſuppoſed to bind us? Where are we to look for the rule which is to direct the conduct of Man towards Man; and of Nation towards Nation?

We have anſwered, to that religious and moral ſyſtem, whatever it may be, which the different men and nations that are in the habits of intercourſe with one another, conſider of force ſufficient to govern their

their various actions. Of theſe we may be allowed to ſpeak with certainty, ſince of theſe, the firſt principles, or in other words, the premiſes, are ſuppoſed to be ſettled and generally underſtood by thoſe who purſue them; while others, which are too raſhly extended to all mankind; are for the moſt part fluctuating, and even after being fixed, are liable to be changed. It follows therefore, if our principles are allowed, that the greater number of the writers on the ſubject, high and deſerved as is their reputation, have attempted too much in ſetting out from ſuch vaſt and extenſive principles; or in laying down the laws of Nations, as if they were the laws of the World.

General principles ſhould undoubtedly be extenſive; but they ſhould not be the leſs certain for being ſo; and if they are too extenſive, ſo as to become vague, or conteſted, the Theories which are founded upon them are liable to be miſunderſtood, perpetually diſcuſſed, and even overturned.

Rejecting therefore the laws of NATURE and REASON (as the ſole foundation of the law of NATIONS,) becauſe we do not conceive them powerful or fixed enough, to bear the fabric that is erected upon them; we conclude that what is commonly called the law of nations, is not the law of *all* nations, but only of ſuch SETS or CLASSES of them as are united together by ſimilar religions, and ſyſtems of morality. It will depend therefore upon the ſoundneſs, or unſoundneſs of thoſe religions and ſyſtems, whether particular nations will purſue the particular ſcheme of morals, which with *us* are called virtuous, or not. If the ſyſtem is well founded, we may expect the law to be of one certain caſt; and of a virtuous character. If it is not well founded, the law muſt be uncertain, fluctuating, and of a Character perhaps deteſtable to many other nations. As a plain conſequence it will follow, that, if two Syſtems

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are totally different, (which may ſometimes happen,) (c) the CLASSES of nations which are governed by them, can have very little like a law, common to both, to direct their intercourſe, and may even therefore be always, or almoſt always, in a ſtate of hoſtility. Hence alſo a corollary may be deduced, that the proportion of obedience which is yielded by any two nations to a *particular* rule of conduct, "muſt depend upon the degree of affinity which there is between their Religions and Syſtems of Morality."

With us in Europe, and the nations that ſpring from us, the moral ſyſtem is founded upon REVEALED RELIGION. In other words, it is the ſame with CHRISTIANITY itſelf. The great plan of our duty; the complexion of our minds; our ideas of juſtice; our ſoftened manners: our laws and cuſtoms; and conſequently the whole force of our moral obligation, take their riſe and colour from the CHRISTIAN Religion. But if this is ſo in all our private relations; in the "charities of kindred," and the character of our municipal laws; it is but a natural conſequence that the ſame leading and eſſential principles of action, ſhould influence the whole body of our LAW of NATIONS. Various other cauſes have no doubt concurred to produce that difference, which in the progreſs of our inveſtigation we ſhall probably diſcover between the European Law, and that of other claſſes of people; and to theſe we ſhall direct our attention in the proper place. For the preſent we content ourſelves with barely pointing out what ſeems likely to be the true foundation of every Law of Nations, as it may appear to govern the different diviſions of the world.

In the next Chapter we mean to come to the more particular application of theſe principles, and to ſhew how what is here only laid down a priori, and in theory, is borne out by the practice of mankind. We ſhall there take a curſory view of the different

(c) See the next Chap.

principles

principles which ſeem to actuate various SETS or CLASSES of people, as they fall into different diſtricts, and obſerve different religious and moral ſyſtems; which if it cannot be ſhewn, we confeſs that the truth of our Theory, though it may not be totally deſtroyed, will be wholly without ſupport.

But farther alſo, if our principles are allowed, the Law in queſtion, muſt not only be different in different diſtricts of the Earth at preſent; but even in the ſame diſtrict, it muſt have varied in the courſe of time, in proportion as revolutions have happened in the religious and moral ſyſtems of its nations.

To the examination of this point we ſhall alſo haſten, and it will be our ultimate taſk, in order the better to prove the truth of our poſitions, to trace the whole progreſs and *changes* of the law among the *European* States; to attempt to point out the cauſes of thoſe changes; to ſettle their chronology; and to mark the connections and duration of their effects.

CHAP.

CHAP. IV.

THAT THE LAW OF NATIONS, IS NOT THE LAW OF THE WORLD.

WHOEVER has conſidered the variety of Character which is every where the attendant of Humanity; the different diviſions of Men into different diſtricts, and almoſt into different ſpecies; the diverſity of cuſtoms, of religion, and conſequently of morals; the notions of right and wrong, extremely oppoſite in diſtant places; the prejudices and manner of life, ariſing from Climate or geographical poſition: whoever has conſidered theſe things, would be led, it ſhould ſeem, to imagine *a priori*, that there was a marked and pointed difference, among different claſſes of nations, in their mode of carrying on their intercourſe together—It has a palpable effect upon the genius of their civil law, (*d*) and we may not unreaſonably believe that it has the ſame on their law of nations; ſo that when by chance, curioſity, or mutual wants, nations that have never heard at all, or heard but little of one another, come to have communication together; the manner of that communication can hardly be the ſame with that to which they have been accuſtomed—I do not here ſpeak of the mere *ceremonial* of the meeting; for that, as might naturally be expected, would be almoſt as diverſified as their dreſs or language; but of thoſe laws, and notions of the nature of their mutual rights, which it is the intereſt

(*d*) See Monteſq Sur les principes qui forment l'eſprit gener. De l'Eſpr. des Loix, L. 19.

of

of all who are concerned to obey, for the ſake of the ſafety of the communication.

The Hiſtory of the World, and the accounts of obſerving travellers, tend very much to confirm the ſtrength of this opinion.

In ſome countries, *Theft*, though prohibited by the inhabitants among one another, has been permitted towards Foreigners. (*e*) With one nation, a *Stranger* has been received with open arms as a Citizen. By the ſame people, when their political ſituation was altered, he was reduced to captivity. (*f*) By another he has been put to death from the mere circumſtance of his being a Sranger. (*g* With a third, he is hardly permitted to land, ſhould he come upon the coaſt, and never to advance into the interior. (*h*) With a fourth, it was even part of their religion to kill him if he be a Chriſtian. (*i*)

When war breaks forth, the varieties of the modes in which it is purſued are without end. A *Roman* thought it right to give notice to his Enemy, and ſummon him firſt to do Juſtice, before he declared himſelf. An *Indian* will lie for weeks in the graſs, and wreak his vengeance upon the offending party without any declaration at all. A *Chriſtian* treats his priſoner with courteſy, and diſmiſſes him

(*e*) Among the antient Germans, the inhabitants of the South Sea Iſlands—The Arabs, and Tartars, &c.

See alſo Buſbequius' account of ſeveral Turkiſh nations which he viſited, among whom he who was held an expert *Thief* was eſteemed a great man, and he who was the contrary was looked upon as a mere ſtock or trunk. Qui dextro Mercurio furatur, magnus cenſetur; qui neſcit, ut ſtipes et truncus deſpicitur: *imo vix communi luce dignus judicatur.*—Leg. Turc. Epiſt. 3.

(*f*) Vide infra Chap, VI. concerning the Greek and Roman Law.

(*g*) By a law of *Buſiris* in Ægypt, and the cuſtoms of the Scythians who immolated Strangers to Diana.—See Puffend. reaſoning upon theſe cuſtoms. D. de Nat. & des Gens. 2. 3. 9.

(*h*) The law of China.

(*i*) The Mahometan law.—Alcoran, Ch. 8. 40.

now without ranſom; (k) A *Turk* condemns him to miſerable Slavery. Vaſt Empires as we have ſeen are in the practice of *ſacrificing* their Captives, in a manner the moſt horrid, out of duty to their Gods: Other Savages will pour molten lead down their throats, or confine them for years in dungeons in the common mode of puniſhment; Others again, will tie them to ſtakes, and eat their mangled and half roaſted fleſh before their faces, out of a principle of honour. One tribe of men, will poiſon their weapons; Another, will make uſe of none that do unneceſſary miſchief: Among one ſet of people, a *Pirate* is almoſt a term of honour: Among another, he is hanged as a Thief. With one Sovereign, an *Ambaſſador* is the moſt ſacred of characters: With another he is conſidered as a mere hoſtage for the good behaviour of his nation.

This diverſity of cuſtom is endleſs; yet all the nations thus differing in their mode of intercourſe, imagine they are purſuing a conduct warranted by Laws which are common and well known, and the contrariety is moſt marked between countries that are moſt diſtant, and moſt ſeparated by religious opinions.

The GOD of WAR, was almoſt the only GOD, worſhipped by our *Scythian* anceſtors; and the ſtate of their part of the world, was accordingly a ſtate of perpetual war. To mix and to die in the battle, in order to drink from the ſkulls of Enemies in the Hall of ODIN, was a part of their religion, and deareſt ambition; and he was diſgraced who had not well earned theſe honours. A people however of this ſtamp, could never be brought to liſten to doctrines, or to attend to laws which called for the

(k) For the account of Ranſom, as it formerly ſtood, ſee Chap. 9.

obſervance of peace and order, ſuch as the Chriſtians held out, and comparatively practiſed. (*l*)

When the New World was opened to the ſpirit and adventure of the Old, it was reaſonable to expect what was found; new laws and cuſtoms, as well as a new people and language. But on that very account it was not reaſonable to expect, that the intercourſe between the Spaniards and the Mexicans ſhould be governed by the ſame cuſtoms as the intercourſe of Nations in Europe: nor, if the latter ſacrificed their priſoners to their Gods, could the former fairly complain of it as a breach of the Law of Nations. Yet to the aſtoniſhment and horror of every thinking and good mind, this was one of the charges on which the innocent and unfortunate monarch of PERU, was put to death by the ruthleſs PIZZARO. (*m*)

Examples might be drawn out to a length, even fatiguing, to ſhow how oppoſite the general notions of States have been at various times and places, and how little it can be expected to find a ſimilarity of ſentiment or of conduct, except among particular nations only, few in compariſon with the reſt of the world.

Such nations indeed we may reaſonably ſuppoſe to be governed by the ſame law, which is rendered the more neceſſary, as their intercouſe is more frequent; they will naturally at leaſt, pay higher reſpect to cuſtoms which are known and received, and which accommodate themſelves to their own prejudices; than to others, of which they know nothing which they do not underſtand, or which may even be repugnant to their deareſt and moſt favourite principles.

(*l*) See Chap. 7. on the Scandinavian Law of Nations.

(*m*) Robertſon's Amer. 3. 46. Atuhalpa was even tried by a Spaniſh Court of Juſtice.

According

According therefore to our former obſervation, we find that the world is for the moſt part *carved out*, as it were, into different *Sets of Nations*, all of them underſtanding one another; and the alliance is the more ſtrict, according as they are bound by the ſame political ſyſtem, the ſame intereſts, the ſame religious prejudices, or the ſame geographical poſition.

The latter is of great importance. The whole ſpirit and genius of a People may take their riſe from their ſituation on the Globe; and they are Shepherds, Huſbandmen or Merchants, according as they find themſelves placed in Mountains, in Plains, or on the Coaſts of the Sea. Each Claſs of People may be ſaid to have a different Law of Nations; and with the latter this remarkable circumſtance almoſt invariably attends them; that that which ſeems the moſt tranſient, the moſt evaſive, and the moſt common of all the works of nature, becomes a fixed permanent property, through the avarice of man. Wherever a ſpirit of commerce has prevailed, the Sea has become as much an object of contention as the Land. The poſſeſſion of certain Fiſheries, and the right to a particular Navigation, have every where been points of the utmoſt importance in the Politics of the Nations intereſted, and given birth to certain regulations and laws, wholly indifferent, if not wholly unknown to Nations of an oppoſite character.

The account and hiſtory of *all* theſe various laws in different parts of the world, and at different æras of improvement, would be a work of no mean conſequence to a mind of enlarged enquiry; (*n*) it

(*n*) A ſlight enumeration of ſome few of them has been made by Dr. Falconer, in his Remarks on the Influence of Climate. B. 6. Chap. 3. Some of them alſo are to be found ſcattered up and down the bulky work of Anderſon on Commerce.

is not however the object of the preſent diſſertation to attempt it.

Thus then, diſtinct Claſſes of Nations have diſtinguiſhing Sets of cuſtoms.

The North American INDIANS have one; the INDIANS of the South Sea another; The NEGROES a third; the GENTOOS a fourth; the TARTAR Nations a fifth; The MAHOMETANS a ſixth; The CHRISTIANS a ſeventh, and ſo on.

With the two laſt, their Religion had in other times an evident, and if I may ſo ſay, a *formal* effect, upon their Law of Nations. The follower of MAHOMET was commanded by the volume of his duty (*o*) to wage war on Chriſtianity, and to ſlaughter its profeſſors; and his very mode of making proſelytes was by the ſword. (*p*)

On the other hand we find nothing ſo common in the public affairs of Europe, (more particularly in former times, when its danger was more to be dreaded,) than to take arms for the defence of Chriſtianity againſt the Turks; and the Family of *Auſtria*, whoſe power and zeal in that ſervice were greater than others, derived at one time, much profit from an attention to theſe prejudices. (*q*) of the ſame nature with this, were the motives for thoſe deſolating wars known by the name of CRUSADES; in

(*o*) Alcoran, Chap. 8. 40.

(*p*) See Mod. Un. Hiſt. 1. 248. Octav. In more antient days alſo, the profeſſion of Chriſtianity was the cauſe of enmity from the Perſians to the Romans. "I will never give peace to the Emperor of Rome," (Heraclius) ſaid Choſroes, "till he has abdured his crucified God, and embraced the worſhip of the Sun."—Gibbon's Dec. and Fall, Cha. 46.

(*q*) A compliance alſo with theſe prejudices, formerly produced an opinion in England, that it was againſt the Common Law to make a Treaty with Infidels. 4 Inſt. 155. See the Chapter on the Influence of Treaties and Conventions.

which

which the extirpation of Infidels, and the recovery of a Country fairly poſſeſſed according to the maxims of the world; (*r*) were held out as legitimate and equitable cauſes for war, merely from the ſacredneſs of the prejudices in its favour. It is needleſs to point out how little this could be admitted by nations who never had heard the name, much leſs of the hiſtory, and who could not poſſibly underſtand the nature of the Divinity of Chriſt. (*s*)

The community of worſhip however is conſidered by Grotius as ſo great a bond of political union among the Chriſtians, that in that part of his work which treats of Alliances, he holds that no *Chriſtian* State can be excuſed from aſſiſting another, when attacked by *Infidels*. (*t*)

This profeſſion of the ſame Religion, marked out the European Nations as diſtinct from the reſt, in various other ways. To preſerve the peace of Chriſtendom, and ſpare the effuſion of *Chriſtian Blood*, was always, and is at this day, a favourite and popular reaſon given by one State, for its interference in the affairs of another.

The Pope indeed, as the common Father of Chriſtendom, was the directing member, or more proper-

(*r*) The Holy Land had been in peaceable poſſeſſion of the Infidels for five hundred years when the Cruſades broke out.—Maimbourg. Hiſt. des Croiſ. L. 1. An. 1093.

(*s*) To uphold the Glory of the Almighty, to recover the Kingdom of Chriſt, and to promote the good of the true Believers, were the profeſſed cauſes of thoſe celebrated wars, in which the Weſt and the Eaſt were in arms againſt one another, with very little interruption, for a ſpace of four hundred years; Maimbourg himſelf even ſo far down as the laſt century, ſeems to think that they were acceptable to God. "Ou plutot," (ſays he, ſpeaking of Peter the Hermit) "que Dieu, qui avoit choiſi cet "inſtrument *pour faire eclater ſa puiſſance et ſa gloire*, &c. Id. Ib.

(*t*) De J. B. et P. 2. 15. 12. He poſſibly however means only in thoſe caſes where the exiſtence of the common religion is abſolutely threatened; as long before his time, the Turks were received into the political connections of Europe. Vide infr. Chap. XV.

ly,

ly, as we ſhall ſee, (*u*) the Deſpot of a very ſtrict Alliance between States, in other reſpects, as independent of one another, as the moſt diſtant and unconnected Nations. Accordingly, no feature in the hiſtory of Europe is more ſtriking than that vaſt and frequent aſſemblage of all the Sovereigns of Chriſtianity, or their Repreſentatives, in what were called the *OEcumenical* Councils. In theſe, many things were ſettled excluſive of mere points of faith; more particularly, the precedency of Nations, the rank and power of Sovereigns, and not unfrequently their right to their Thrones themſelves; points which it is palpably the province of the Law of Nations alone to determine. (*x*) Rank and precedency were even made to depend, amongſt other things, upon the priority of converſion to the Chriſtian Religion: (*y*) an expreſs diviſion was made of thoſe who profeſſed it, into four quarters; (*z*) and the very name of *OEcumenical Council*, according to Father PAUL, was derived, after the diviſion of the Weſtern from the Eaſtern Empire, from the unity and communion of thoſe States and Countries which obeyed the POPE. (*a*)

Even the diviſion of the ſame Religion into different ſects, may ſometimes produce a partial alteration in the Law of Nations, according to their tolerance or their bigotry. The ſuperſtition of the Roman Ca-

(*u*) Vide infra. Chap. XII.

(*x*) Frederick II. one of the moſt active Emperors of the Houſe of Suabia, was depoſed at the Council of Lyons, held expreſsly for that purpoſe by Pope Innocent IV.—Mat. Paris, 672. But ſee this ſubject amply diſcuſſed, Chap. XIII.

(*y*) Mackenzie's Law of N. as it concerns precedency, Page 6. —Howel on Preced, 9, 10, 11, See alſo Cotton's brief Abſtract of the queſt. of Preced. between England and Spain, preſerved in the Harleian Manuſcripts.

(*z*) Italy, Gaul, Germany and Britain. (M. S. Cotton's Preced. of Eng. and Spain.)

(*a*) Fr. Paul. in Pref. Con. d. Trent.

tholics,

tholics, particularly in former times, had an evident effect upon ſome of their laws with reſpect to the privileges of Stranger Nations, who thought differently from themſelves; and while the Reformation was in its infancy, attempts were not unfrequently made to cut off a right univerſally held to depend upon the Law of Nations, namely, that of Ambaſſadors to the free exerciſe of their own religion. (*b*)

It is more evident in the manner in which various Colonies have been ſettled, according as the religious notions of the Settlers were liberal or confined. PENNSYLVANIA was purchaſed by fair treaty from the Indians, by the equitable and tolerant QUAKERS; the Indians of South America were reduced to Slavery by the SPANIARDS, upon the pretence of converting them more eaſily to Chriſtianity.

The ſame diverſity of Spirit appears in a variety of other inſtances; and whenever a conduct is adopted in the courſe of War or Peace, contrary to the approved cuſtoms of Europe, though conſonant with the practice of other parts of the world, it is a fair ground for complaint. Thus when the Duke of *Guiſe*, had put ſome Spaniſh ſoldiers, whom he had taken priſoners, into chains; it was made the ſubject of loud complaint by the Spaniſh Ambaſſadors at the Congreſs at *Vervins*, as contrary to the Laws of War, and the humanity which ought to be obſerved *among Chriſtians*; who never, ſaid they, treat their priſoners as if they were *Turks*. (*c*) By the *Turkiſh Law of Nations*, therefore, this treatment was not illegal; a clear proof that there were more laws than one. It is no doubt in conformity with this ſpirit alſo, that with ſome Nations we are forced to make expreſs *Treaties* to deliver ourſelves from piracy and ſlavery;

(*b*) Wicquef. de L'Ambaſſ.
(*c*) Lettre du 26 Fev. au Roi. 1598. Mem. de Bell. et Still.

while

while among our own, (that is, in EUROPE) the law obſerved by it, is ſufficient protection without them.

Again, it is an opinion generally inculcated, and deſervedly ſo, that from the relationſhip of all the World, we ought to be hoſpitable and kind to *Strangers*, whether they come from the Eaſt or from the Weſt; whether they adore MAHOMET, or CHRIST; and this forms a very fair part of the *European* Law of Nations. The *Turks* however are taught by their religion ſo to hate and deſpiſe the *Chriſtians*, that the epithet "*Chriſtian Dog*," is every where beſtowed upon them. It is even forbidden them in many parts to make uſe of ſo noble an animal as the Horſe, and they are forced, as a mark of ſubmiſſion, to content themſelves with the humbler Aſs, whenever they appear in public. (*d*)

It is generally inculcated, that Strangers ſhould be equally protected in their property with Natives; and any public violation of this rule, authoriſed by an *European* government, would raiſe an univerſal outcry againſt it among the ſurrounding States. A very few miles by land or ſea, bring us to countries whoſe exiſtence almoſt depends upon the pillage of Travellers; and were you to preach the obſervance of your own cuſtoms to a *Tartar*, or an *Arab*, he would not underſtand you.

There is another very ſtrong ſhade of difference between EUROPE and other parts of the globe, which powerfully confirms the ſuppoſition we have ſtarted; and that is, the remarkable opinion entertained by all European States reſpecting that famous part of the Droit Public, known by the name of the BALANCE of POWER. Of this, according to the preſent ſyſtem, the people of Antiquity, knew little or nothing; and it was unknown even to modern

(*d*) For this, and many other indignities, ſee Gibbon, Dec. and Fall, Chap. 51.

Nations

Nations themſelves before the time of CHARLES the Fifth. There is indeed a kind of natural policy, which ſelf-preſervation will ſuggeſt to all States, of uniting againſt one common powerful enemy, whoſe hoſtility is open and flagrant; and this is to be met with throughout the World: But no SET of NATIONS, that I have yet heard of, except the moderns of Europe, have laid down a *Syſtem* to prevent *long before hand*, even the *juſt* Augmentation of any particular Power, which in the end might prove detrimental to the reſt; nor were any SET of NATIONS before theſe, ſo connected together by *Treaties*, *Alliances*, *Guaranties*, and various other ties, that the preſent ſtate of things can hardly be altered without the common conſent. The fear of ſuch an acceſſion of power as may prove fatal to the independence of Europe, is now held to be a fair cauſe for War; and Nations without ſenſe of *immediate* injury, or wiſh to avoid *immediate* danger; conſequently, without perſonal hate or paſſion, now join chearfully in the moſt dreadful conflicts to which the lot of Humanity is liable; a circumſtance which may be conſidered as one at leaſt of the cauſes of that poliſh and mildneſs which regulate the more humane mode of modern warfare.

An attention to this great variety in the common governing principles of action, which certain Communities entertain to the excluſion of others; has drawn from the Writers on the Subject, ſtrong *hints* of the ſoundneſs of the opinion we have adopted. I call them hints, becauſe no treatiſe that I remember to have ſeen, has yet ſet it down as a broad uncontroverted propoſition. But though no poſitive aſſertions are to be met with to this purpoſe, yet from a combination of the general views of the matter that appear to have been taken; the ſenſe of various authorities is almoſt as clear to the point, as if it had been expreſsly aſſerted.

M. De

M. *De Callieres*, in his book called " La maniere de *negocier* avec les Souverains," confines this Negotiation to the *Sovereigns of Europe*. " In order the " better to underſtand," ſays he, " the utility of Ne- " gotiation, we muſt conſider *all the States of Europe* " *as having ſuch intimate connection together, that they* " *ſeem to be the members of one and the ſame Republic.*" (*e*) To this purpoſe alſo are the ſentiments of other writers, as we ſhall hereafter have occaſion to demonſtrate.

In the treatiſe de Foro Legatorum, by Van Bynkerſhoek, there is a very ſtrong *implied* opinion in favour of our ſyſtem. A queſtion is made in the nineteenth Chapter, how far any one Nation has the right to take from Ambaſſadors, the privileges awarded to them by the law of Nations. The author is clear that it has that power, provided it declares its intention before hand; for, ſays he, the enjoyment of all their privileges depends upon *conſent*. One Nation can impoſe no obligation on another, nor can the conſent of all the Nations in the World together, force any one free State, ſingle as it may be, to follow their cuſtoms, if it chuſes to adopt others.—This opinion is founded upon that of GROTIUS, which holds that though it is contrary to the received Law, to try an Ambaſſador in the courts of the country he reſides in; yet before he is received in the country, it may be *ſtipulated* that he ſhall ſo ſubmit to them. (*f*)

VATTEL, alſo, adopts it in all its extent, when he comes to that part of his ſubject. (*g*) But if theſe Authorities

(*e*) De la man. de neg. Chap. 3. but vide infr. the ſubject purſued hiſtorically, particularly Chap. xiii.

(*f*) Grot. D. J. B. et P. 2. 18. 5.

(*g*) " Voyons donc quelle obligation la coutume, l'uſage reçu, " peut impoſer aux Nations, non ſeulement en ce qui regarde les " miniſtres, mais auſſi en general ſur tout autre ſujet. Tous les " uſages, toutes les coutumes des autres Nations, ne peuvent obli- " ger un Etat independant, ſinon en tout qu'il y a donné ſon " conſentement

Authorities are allowed, it is clear that the Law may be totally altered, according to the Will of particular Nations; and if ſo, it can never be ſuppoſed, from the mere force of the term, that it is binding upon all the World.

If Authority however, were ſtill wanting, GROTIUS and SUAREZ, are ſo full to the point as almoſt to decide it. "The Law of Nations," ſays the firſt, "receives its force from the conſent of all Nations, "or at leaſt of many of them. I ſay many, becauſe "there is ſcarce any Law, but that of Nature, "which is common to *all* the World. *Nay, there "may even be found in one part of the Earth, a Law of "Nations, which is not known in another part of the "Earth;* as we ſhall demonſtrate in its place, when "we come to ſpeak of Captivity and Poſtliminium." (*h*) Of the ſame opinion is *Suarez*, who affirms in different parts of his work, that the law in queſtion may be changed as far as it depends upon the conſent of men; that it may be changed by any particular Kingdom or Republic; and even, according to ſome, by *private authority*. (*i*)

It

"conſentement exprés ou tacite. Si quelq'une y decouvre dans la "Suite, des inconveniens, elle eſt libre de declarer qu'elle ne veut "plus s'y ſoumettre, et ſa declaration une fois donnée bien claire-"ment, perſonne n'eſt en droit de ſe plaindre, ſi elle n'a aucun "egard à la Coutume."

Droit des Gens. L. 4. Ch. 7.

So alſo Bynkerſhoek, "Gens Gentem non obligat, *nec vel om-"nes Gentes obligant aliam*, licet ſolam, qui ſui juris eſt, et aliis "legibus uti decrevit."

De For. Legat. C. xix.

(*h*) "Jus Gentium, id eſt, quod Gentium omnium aut multa-"rum voluntate vim obligandi accepit. Multarum addidi, quia "vix ullum Jus reperitur extra Jus naturale, quod ipſum quo-"que Gentium dici ſolet, omnibus gentibus commune. Imo ſæ-"pe in una parte orbis terrarum *eſt Jus Gentium quod alibi non "eſt*, ut de Captivitate et Poſtliminio ſuo loco dicemus." Le J. B. et P. 1. 1. 14. 1.

(*i*) Quarto ex dictis colligitur Jus Gentium eſſe mutabile quatenus ex hominum conſenſu pendet; in quo etiam differt ex Jure naturali,

It is very true that *Burlemaqui* contends, that variations, when they are cruel, are mere barbarous cuſtoms, from which all juſt and well-regulated Nations ought to abſtain (*k*) But ſurely, when the very queſtion is concerning the *univerſality* of a cuſtom, and other cuſtoms are proved to exiſt; to get rid of them in this way, is a mere petitio principii; not to mention that the Nations thus adopting other Laws, have an equal right with any other, to call themſelves (according to their own ideas at leaſt,) juſt and well-regulated. (*l*)

Among the antient *German* People, the death of a man was not conſidered of that high conſequence, which the purer doctrines of Chriſtianity, and the more regular policy of modern States give to it at preſent; hence every murder, however atrocious, had the penalty of a fine in money ſet upon it, as the only puniſhment. When the juriſprudential Writers, however, come to conſider the Nature of the power of puniſhment; they all lay it down, that crimes againſt the Law of Nations, are puniſhable by *all* Nations; whether thoſe who have received the injury or not: and among thoſe crimes are expreſsly in-

naturali. Imo dicunt aliqui poſſe mutari a privata auctoritate. Ratio eſt quia res prohibitæ Jure Gentium ſimpliciter, non ſunt malæ de ſe, et intrinſece.—Suarez, De Leg. ac Deo Legis. L. 2. C. 20. S. 6.

Nam prius Jus, poteſt immutari a particulari regno vel republica, quantum ad ipſum, &c. Id. L. 2. C. 20. S. 7.

(*k*) Du Dr. Nat. 2. 6. 8.

(*l*) We have unfortunately, in the preſent times, experienced too ſtrong a proof of this. The miſerable departure of the French from that humanity which has conſtituted the diſtinguiſhing honour of modern warfare, however execrated by all good men, is conſidered by themſelves *as an elevation of their character.*

I have already, in the preface, diſclaimed all perſonality or paſſion, in any thing I may be forced to remark concerning the French. The preſent example is evidently the beſt proof that could be cited in the ſimple courſe of the argument; and wholly, therefore, independent of all perſonal feelings as an Engliſhman.

cluded

cluded Murder, and even Adultery. (*m*)—The doctrine is juſt with reſpect to thoſe Nations that obey the Law; but it would be ſurely too much for any one to aſſume the power of inflicting death (the puniſhment commanded by it) upon a murderer of that Nation, which, like our *Saxon Anceſtors*, compounded the injury for a ſum of money.—Still leſs could it be expected that a man, whoſe very religion perhaps admitted of a community of Wives, ſhould know he was committing a crime, in merely conforming to his cuſtoms, becauſe *other* Nations chuſe, however reaſonably, to conſider it as a breach of *their* Law.

We have already obſerved, (*n*) that ſome authors have called inceſtuous marriages, in the aſcending line, a breach of natural right; and they hold alſo, that, according to natural right, any man who has offended againſt Nature, may be puniſhed by him who has not. (*o*) Now the Perſians and Aſſyrians, as has been mentioned, in many caſes, not only permitted, but held the offspring of ſuch marriages in honour. (*p*) It would be abſurd to ſay, that according to the Law *of all the States of the World;* any one of them could juſtly puniſh the Perſians and Aſſyrians for theſe acts, however abominable!

From all that has been ſaid, a very eaſy expoſition is to be deduced of a remarkable phraſe of the Preſident MONTESQUIEU; remarkable however only in the caſe, that his opinion on this ſubject is different from ours.

(*m*) 4 Inſtitute 153. Coke there goes ſo far, as to call even Felony, a crime againſt the Law of Nations.—It would be needleſs to ſhew the injuſtice of puniſhing a Foreigner (though of Europe) for a crime, of which he might know nothing.

(*n*) Chap. II. (*o*) Grot. D. J. B. et P. 2. 20. 3.

(*p*) "Si les Aſſyriens, ſi les Perſes, ont epouſé leurs meres, "les premiers l'ont fait par un reſpect religieux pour *Semiramis*; "et la ſeconde par ce que la Religion de *Zoroaſtre* donnoit la pre- "ſérence à ces Marriages."—Monteſq. De L'Eſp. D. Loix. L. 26. Ch. 14.

When

When he ſpeaks of any Nation, or Set of Nations, as the Tartars, and others, he ſays, *the Law of Nations is* ſo and ſo; a clear proof that he thinks there are different laws of Nations exiſting in the World. Thus ſays he, the law of Nations of a people who are yet in the *Shepherd* ſtate, has for its ſubject, what among more civilized people is the ſubject of municipal inſtitution. (*q*) The Law of Nations *obſerved by the Tartars*, is to *deſtroy* where ever they appear! (*r*)

The anonymous Commentator of Monteſquieu, does not comprehend, how that can be the Law of Nations, which profeſſedly is deſtructive of all Law. But the anſwer is plain; it means, that thoſe people who are in this terrible intercourſe with one another, *expect*, and *know* that it will be thus terrible; and this very *knowledge* and *expectation*, make it *Law*. In the ſame manner as the Law of *Turkey*, which veſts every thing in the will of the Prince, and which therefore appears *to us* to annihilate *all Law*; is, in fact *to its inhabitants*, the Law of that Country.

We ſee then the effect of RELIGION, MORALS, and GOVERNMENT, not only upon the genius and laws of particular people, but upon whole Diſtricts of the Earth; and where there are ſuch oppoſing principles acting upon the minds and conduct of different CLASSES of Nations, it is in vain that you expect them *all* to conform to the ſame law in their public intercourſe; equally perhaps in vain as if you expected the ſpirit of every Government, and of every code of municipal law, to be the ſame throughout thoſe States which, according to us, obey the ſame law of Nations. When therefore we make uſe of the common expreſſions, "*the Law of Nations*," or "*the whole World*," they are ſeldom to be taken in the extenſive ſenſe which is implied by thoſe

(*q*) Eſp. des Loix. L. 18. Ch. 12. (*r*) Id. Ch. 20.

terms; but always with ſuch modifications as the ſubject we may happen to be upon, will point out to us. Thus, in relating the tranſactions of Indian or African Empires, ſuch expreſſions would merely mean the law of *Indian* or *African* Nations; and the *Indian* or *African* World; and ſo alſo, in our own daily tranſactions in Europe, we mean by them nothing more than the law of the *European* World.

CHAP

CHAP. V.

HOW DIFFERENT CLASSES OF NATIONS MAY BE DISTINGUISHED.

I AM here aware of a very natural queſtion which has the faireſt right to be anſwered before we advance farther.

If theſe principles are true, and the world is really ſo divided, as it is ſaid to be; the diviſion no doubt ought to be marked and clear;—and as every Nation aſſumes the right of deciding upon the law, it ſhould be known beforehand, what CODES particular States obey, in order to prevent an unjuſt interference. We may therefore, it ſhould ſeem, be fairly called upon to ſhew the exact diſtinguiſhing line, by which Nations may be ſaid to belong to this, or to that Claſs.

It muſt be confeſſed that the anſwer to this, is not without its difficulty; for as there is no common Sovereign Legiſlator; no general appellant Juriſdiction; it is ſcarcely poſſible to point out with exactneſs, (or indeed any thing approaching to it,) what are the particlar States that are held bound to obey any particular Code. From what has gone before however, much may be collected, which, though it may not amount to abſolute certainty, will at leaſt prove to us a pretty ſure guide in the enquiry.

For example; whenever we obſerve many different Communities, in the habit of making *Treaties* and *Alliances* together; of holding *Congreſſes*, and entertaining *ordinary* or *reſident Embaſſies* at one another's Courts; of appealing to each others *Mediation*;

of

(*a*) of deciding their differences *by one known ſettled rule*; (let it be good or bad;) or of carrying on War in the ſame mode, (be it cruel or lenient;) above all, when we ſee them governed by the ſame cuſtoms, ariſing from climate or geographical ſituation, and bound together by *one common Religion*; then, may we fairly ſuppoſe that they agree, tacitly or expreſsly, to obey the ſame law of Nations.

One thing is deciſive; and that is, when we obſerve them ſearching for the rule of their duty *in the ſame Codes of Juriſprudence*, and agreeing to pay reſpect to the opinions of the *ſame Writers*; in which caſe, it is equal to abſolute demonſtration, that they all come under the government of the ſame Law. (*b*)

With us in Europe, and the Nations and Colonies that ſpring from us, this has long been the practice. Things for the moſt part are ſettled and underſtood: the ſame *Laws of War and Peace*, of *Treaties*, and *Alliances*, are obeyed; the ſame *Maxims* are enforced; the ſame *Authorities* are cited; the ſame *Religion* unites us. It is not ſo with other Nations; and the

(*a*) See Mably on the mode in which it is likely that the Turkiſh Empire will in time aſſimilate itſelf with the European States.—Droit. Pub. ch. 5. For the progreſs of theſe parts of the law in Europe, vide infr. chs. x. xiii.

(*b*) Hence when we ſee a Nation, or its Miniſter, refuſe to acknowledge authorities generally received by other States; it is a clear ſign, that it means no longer to obey the old Law of Nations: in other words that it means to withdraw itſelf from its *Set* or *Claſs*. We muſt all recollect the correſpondence between the American Government and the French Envoy, *Genet*. Being told that his proceedings were contrary to the ſpirit of the doctrines of *Grotius* and *Vattel*, he replied, that he knew nothing about *Grotius* or *Vattel*, but that his conduct was conformable to the doctrines of the *French Conſtitution*. This was either ignorance, or deſign; if the one, it can form no caſe; but if the other, it was almoſt a direct notice, that the French meant to retire from the obedience they had paid to the Code of the European Law.—In the latter caſe, therefore, Genet was not a *Fool*, as he has been called, but merely conſiſtent.

propoſition is thus demonſtrated, that when *we* ſpeak of the Law of Nations, we mean only the Nations of our own SET, that is, of EUROPE.

But though a particular number of States may be avowedly within the pale of the ſame Law; it certainly can hardly fail to happen that there may be others barely *upon the verge of it*; and the complexion of their character, is therefore dark and doubtful. Theſe, " may partake of two laws at the ſame " time;" or they may abſolutely be under the controul of one, with the reſt of the Nations of *their own Claſs*; while they partially adopt the other, as far as it regards their partial intercourſe with the *Nations of another Claſs. (c)* Such States as theſe, are for the moſt part bordering upon one another; or if at a diſtance, connected in ſome meaſure by Trade and Navigation; and ſuch States may be deemed to be *in a kind of Twilight between the two Laws.*

In this ſituation, the TURKISH EMPIRE ſeems to have been for ſome time; governed no doubt in its intercourſe with the Nations of the Eaſt and South, by the ferocious maxims of thoſe countries; but turning, with a manner ſomewhat ſoftened, to a connection with the States of the Weſtern World. *(d)*

In this ſituation alſo formerly, the Ruſſian and Poliſh Nations continued, before they came to adopt our manners and maxims in all their extent; and as it was comparatively late before this happened, they have ſometimes been called the mere *Primi Barbarorum.*

The Ruſſians took their place in the *European Republic* through the medium of the Greek Empire,

(*c*) Per emationem mutuam populorum ſine ſpeciali conſenſu uno tempore facto.—Suarez. Corollary 1. cap. 20. l. 1. De leg. ac Deo, &c.

(*d*) See a good hiſtorical ſketch of the connection between the Porte and the European States by Treaty, in Mably Droit. Public. ch. 5.

having

having embraced Chriſtianity in 989, when their prince Walodomir eſpouſed Anne the Siſter of the Emperor Baſilius Porphyrogenitus. (*e*) And it is not impoſſible that their backward ſtate of civilization and fraternity with the European States, might be owing to this, among other cauſes; the Greek Empire, though much connected from ſituation, being different in manner, character, and race, from the German Nations. (*f*)

The Pruſſians were even behind them in rank; and their entry into the Claſs which obey the European Law, was probably marked by their converſion to the Chriſtian Religion.

So late as the thirteenth century, they are deſcribed to have been buried in the moſt profound depth of ignorance and idolatry. They at firſt lived promiſcuouſly according to tradition, in woods, having neither manners, nor order, till an old man, named WAYDEWUT taught them by the example of the Bees the neceſſity for a King. He himſelf was the firſt Sovereign, and in extreme old age, offered himſelf a voluntary ſacrifice to the Gods of the Country. The Knights of the Teutonic Order made holy war upon them, and even in the thirteenth century, ſuch was their ſavageneſs, that they ſacrificed thoſe that fell into their hands, to their Idols.

By that time however the ſeeds of Chriſtianity were ſown among them; and between the zeal of Miſſionaries, and the ſwords of the Knights, they quitted their ignorance and entered into the *rank of the nations of Europe.* (*g*)

(*e*) Gibbon. Decl. & Fall. ch. 55. Puffend. Introd. a l'hiſt. Un. l. 5. ch. 2.

(*f*) It was the opinion of Monteſquieu that Religion degenerated in Ruſſia under the *Greek* Emperors, to the low ſtate in which it continued, till Peter the Great renovated the whole nation in Religious, as well as other matters. (Grand. et Decad. Rom. ch. 22.)

(*g*) Puffend. Introd. à l'hiſt. un. l. 5. ch. 1.

How, or when it is, that a people in this ſituation may be ſaid with accuracy to quit their own SET, in order to enter into another; and by what modes and gradations it does ſo, is very difficult to be determined. In general however we may obſerve, that the ſteps have been very gradual, and the manner by TREATY.

Thus, the connection between *Europe* and the *Mahometan* States, ſeems univerſally to have commenced by Negotiation, and Alliance. In former times, their mutual relations were ſolely thoſe of Enemies.—They exhauſted themſelves in war; they made peace, not to acquire friends in one another, but merely to recruit their loſſes; and that which firſt recovered, was the firſt to recommence hoſtilities. (*h*) But the weight and impreſſion of the character of *Charles* V. as they were the cauſe that the Syſtem of Europe was firſt reduced to ſomething like regular principles; ſo they extended themſelves beyond the bounds of European Politics, and were the means of introducing the *Turkiſh* power into the *Chriſtian* Confederacy. It was the more effectually to balance his ſuperiority of conſequence, that *Francis* I. was driven to encounter the religious hatred of many of his fellow Chriſtians, when he ſubmitted (though not the firſt as has ſometimes been ſuppoſed) to enter into alliance with the *Infidels* of Conſtantinople. Long after his time however, the PORTE was ſo ignorant of the affairs of Europe, that till they became acquainted with the power and energy of ELIZABETH's character, they believed *England* to be a province of *France*; (*i*) and even then, accorded privileges to the *Dutch*, on the ſuppoſition that the Belgic State

(*h*) We ſhall conſider this ſubject more at large when we come to the influence of *Treaties* upon the European Law of Nations.

(*i*) Birch. Mem. of Eliz. 1. 36.

was a dependency of *England*. (*k*) For a century and an half afterwards, they were but little known except to their old enemies the *Venetians* and *Auſtrians*, and were viſited by more diſtant people, as the Chineſe or Perſians are viſited, for the ſake of commerce.

It may be ſuppoſed therefore that little change was made in their maxims of State, or their law of Nations; and, accordingly, the moſt flagrant breaches of the Law, will generally be found to have happened in our intercourſe with *them*.

The growth however of the power of *Ruſſia* in the preſent century, and the conſequent neceſſity of ſupporting the *Ottoman* Intereſt, will probably be the means of their aſſimilating more cloſely with ourſelves, than ever; as far at leaſt as their religious prejudices will permit.

By Treaty alſo, the *Barbary* States have at length been induced to aſſume a character a little, and but a little, more conformable to *European* maxims. Stipulations are inſerted in various articles of Treaties that have been made with them, that public Miniſters ſhall enjoy the protection of the Laws of Nations; and what thoſe Laws are, we are forced actually to explain to them.

We have been the more particular and elaborate, poſſibly ſo as to have become prolix, upon this important part of the ſubject; becauſe though the arguments for our Syſtem are ſufficiently obvious to any one who attends ſeriouſly to them; yet they have not only never till now been collected into one broad point of view, but are actually not often to be collected, except by implication.

(*k*) Mably. Droit. pub. ch. 5.

No one has yet laid it down in a clear, ample and preciſe manner that the Laws which are the objects of our enquiry are *not* the Laws of the World; of courſe no one has yet examined, how far they obtain with particular Nations; or how far attention ought to be paid to the circumſtance of their obeying another Code.

And here we ſhall take our leave of the general ſubject, having demonſtrated as far as we are able, the neceſſity in all ſpeculations concerning the *Law* of *Nations*, for confining what we ſay to ſome one particular *Claſs* of them, as they are united together under ſimilar principles of action, and ſimilar caſts of thought.

The chronological account of the law, as we ourſelves have obeyed it in EUROPE; the ſtrange ideas that were formerly entertained of it, generated by various local and important circumſtances; the gradual changes, (and the cauſes of them) which took place in thoſe ideas; together with the laſt improvements that were given to them, ſo as to elevate the Law into the rank of the ſciences, will be explained at large in the following chapters.

CHAP.

CHAP. VI.

THE HISTORY OF THE LAW OF NATIONS IN EUROPE AS OBSERVED BY THE GREEKS AND ROMANS.

I SHALL not detain the reader by enquiring what Savages were the firſt who peopled the foreſts of *Europe*, or examining the ſtate of the intercourſe of wandering Barbarians, who had no political importance, and little political communication. In the earlieſt hiſtory of this remarkable quarter of the Globe, two celebrated and intereſting *Claſſes* of people preſs forward upon our obſervation, ſo far ſuperiour to all others, that they divert us from the reſt, and entirely abſorb our attention. Theſe are the famous nations of *Greece* and *Italy*, the laws of whoſe intercourſe once known, we have little occaſion, as far as it concerns our ſubject, to enquire into thoſe of cotemporary States. They led and domineered in the politics of the world; the mightieſt Nations bowed down before them, and took their ideas and their tone, from their will or example. They were equally celebrated in arts, and in arms; they penetrated the depths of Science; they analyſed the whole mind of Man; and all that the *unaſſiſted* genius of Humanity could attain to, they made their own in a manner as rapid, as it was almoſt miraculous.

One thing however was wanting to the perfection which, had they poſſeſſed it, they would probably have acquired: and that was, the knowledge of the doctrines of a Religion, which whatever may be its points of controverſy, has had the uniform effect, where-ever it has taken root, of producing a more equitable notion of things, and a milder ſyſtem of manners.

Accordingly,

Accordingly, from the want of this great advantage, we may obſerve that the People in queſtion, while they were in the firſt ſcale of eminence in almoſt all other reſpects, fall far ſhort of their poſterity in their ideas of the Law we treat of. The want of a principle ſufficiently binding in their ſchemes of Morality, had a palpable effect upon their characters in private life; and, as might be expected, it transferred itſelf into the ſpirit of their Law of Nations. However therefore we may be accuſtomed to hear of their politeneſs, their arts, their refinements in elegance, or their knowledge of Laws; we find upon enquiry, that their politeneſs, while it ſharpened their underſtandings, had no effect upon their hearts; that their refinements were for the moſt part ſenſual; and when we come to contemplate the general ſcope of their Laws of War and Peace, they will be found too often to reſemble the Barbarians they deſpiſed.

One of the moſt ſtriking Laws of the *Romans*, is that by which, inſtead of conſidering every man as a fellow creature between whom and themſelves there was an implied alliance; he was deemed a Being to whom they were abſolutely indifferent, and with whom there was hardly more connection than with the brutes of the earth: Inſomuch that though, (to uſe the words of the Law) when there was no treaty of friendſhip with any particular Nation, it was not on that account conſidered as an Enemy; yet if any thing mutually fell into the hands of each other, it became a lawful prize; ſo that even if a Citizen of either State came within the territory of the other, he might lawfully be reduced to Slavery, (*a*)

(*a*) Si cum gente aliqua, neque amicitiam, neque hoſpicium, neque fœdus amicitiæ cauſa factum habemus; hi hoſtes quidem non ſunt; quod autem ex noſtro ad eos pervenit, illorum fit: Et *liber homo noſter ab eis captus, ſervus fit, et eorum.* Idemque eſt ſi ab illis ad nos aliquid perveniat. Hoc quoque igitur caſu, Poſtliminium datum eſt.

Dig. L. 49. Tit. 15. L. 3.

and

and it was therefore one of thoſe caſes in which the right of Poſtliminium had place. (*b*)

The whole genius of their character, and of their very language, was of a ſimilar caſt, and the word which ſignified Stranger, was the ſame, both among the Greeks and Romans, with that which in its original, denoted an Enemy. (*c*) Among the former people, every one who did not ſpeak their language was ſtigmatized with the name of barbarian;—Β ρ βαρβος, meaning literally, one who pronounces a language with an improper accent. This however would not be ſo remarkable, was it not for the curious rights which they aſſumed to themſelves over theſe οι βαρβαροι, who were ſo unfortunate or ſo inferior, as to inhabit other Countries than their own. One of the greateſt of their Philoſophers, who carried the reach of human intellect as high as it well could go, aſſerted that Strangers were Slaves by nature; might be conſidered as beaſts of chace, and fairly hunted down; and another in conformity with this, gives it as the opinion of his Anceſtors, that of all wars, thoſe are moſt neceſſary and juſt, which are made by Men againſt wild beaſts; and next to them, thoſe which are made by the Greeks againſt Strangers; "who," ſays he, "are natural-

(*b*) The right of Poſtliminium is that by which any Citizen of one State, taken in War by another, and releaſed from captivity, re-enters the *Threſhold* of his Country and ſucceeds to the enjoyment of every thing which he would have enjoyed, had he never been abſent. The genius of this Roman Law therefore conſiders all Mankind, whom they had not made their Friends *by Treaty*, as a kind of Enemies; who though they do not openly attack them, are perpetually lying in wait for them at home.

(*c*) Hoſtis apud Antiquos, Peregrinus dicebatur.

Pomp. Feſtus.

So alſo Cicero—"*Hoſtis* enim apud majores noſtros is dicebatur, quem nunc *Peregrinum* dicimus. Indicant duodecim Tabulæ, *Aut Status dies cum hoſte.* Itemque, Adverſus *Hoſtem æterna auctoritas.*

De Offic. L. 1. Chap. 12.

"ly

" ly our Enemies, and for whom we are perpetually " laying ſnares." (*d*)

Theſe opinions may ſerve to explain ſeveral of their tranſactions which have been deſervedly conſidered as diſgraceful to them; and among the reſt, the ſhameful treatment of the Ambaſſadors of *Darius*, by the two moſt renowned of their Republics, which has been thought by ſome to have been the mere effect of the turbulent ſpirit of the Athenian Democracy and a direct violation of the Law of Nations. (*e*) Poſſibly however, it was not ſo much an infraction of Law, as a compliance with the prejudices above mentioned, which taught them another ſort of ſyſtem to be obſerved towards Strangers. (*f*)

In the earlier ages of their hiſtory, the profeſſion of Piracy was ſo far from being held diſhonourable, that it was publicly avowed; and ſo late as the time of TARQUIN at Rome; above four hundred years after the age of Lycurgus, and cotemporary with Solon and Piſiſtratus, (when the Athenians are ſaid to have had both Tragedy and Comedy among them, and Greece might therefore be thought to have aſſumed a more civilized form;) the *Phoceans*, on account of the ſterility of their ſoil were forced to exerciſe Piracy, a profeſſion which according to the hiſtorian was *in thoſe times held honourable*. (*g*)

(*d*) Ariſtot. Polit. L. 1. C 8. & Iſocrat. Orat. Panathen. See Grotius' Remarks. D. J. B. & P. 2. 20. 40. 3.

(*e*) Rollin. Hiſt. Anc.

(*f*) It is remarkable that XERXES, Barbarian as he was, ſhewed he underſtood the Laws of humanity better than the Spartans themſelves. That people conceiving themſelves under the indignation of Talthybius for their treatment of a Character ſo ſacred as that of an Ambaſſador; delivered up two of their Citizens as an expiatory Sacrifice to the Succeſſor of the Perſian Monarch; who, out of magnanimity, ſays Herodus, declined following the bad example of the Spartans.—Herod. L. 7. C. 136.

(*g*) Plerumque etiam latrocinio maris, quod illis temporibus, (Tarquinii Regis) *gloriæ habebatur*, vitam tolerabant. —Juſt. Hiſt. L. 43. C. 3. N. 5.

But

But whatever might be their opinions reſpecting the rights of Strangers, their cuſtoms with reſpect to one another were hardly leſs ferocious. The cruelty of their Laws of War is well known; and inſtances of it might be multiplied upon one another, which would fill the more humane European of modern times with horror. The Slaughter of Priſoners in cold blood; the execution of Generals after unfortunate warfare; (a humbled State which commands the lenity and compaſſion of Chriſtian Enemies;) the hardſhips of perpetual Slavery; the abſolute annihilation of Cities; the wanton puniſhment of Hoſtages; the bloody perſonal revenge often taken upon Enemies, only for having performed their duty well; —theſe are the points moſt eminent in the hiſtory of their public intercourſe together.

Examples of this, have already often been ſelected by others; nor is it neceſſary for thoſe acquainted with the Grecian ſtory to enumerate them. It will not however be improper to bring to their recollection, the ſtrange inconſiſtency of character in the Athenians, who were reckoned the moſt poliſhed people of Greece, which marked them in the courſe of their wars. When about to attack *Scione*, *Melos*, and *Mytelene*, they *paſt a vote* to deſtroy all the inhabitants of the former place who were above the age of puberty; in the two latter, all, without exception.

During the courſe of the Peloponneſian war, the Spartans and Corinthians having ſent an Embaſſy through Thrace into Perſia; the ſon of the Thracian King was prevailed upon to ſeize the Ambaſſadors and deliver them to the Athenians. Theſe unfortunate men, cloathed with a character univerſally and uniformly held ſacred, by the moſt ignorant Nations, were put to death without trial, *by a Decree* of a People eſteemed the moſt enlightened of their time. (*h*)

(*h*) Thucyd. L. 2. C. 67.

It

It is wonderful to obſerve ſuch a people in the ſame war, calmly voting in full aſſembly thoſe acts of inhumanity which ſo much diſgrace them. Had they been committed in hot blood, or with arms in their hands, much might be ſaid for them; but in general, when a place which had ſtood a ſiege, was unhappy enough to be reduced to ſurrender; the ferocious populace were formally ſummoned in Athens itſelf, to diſpoſe of their Captives; and the unhappy men commonly became victims to the avowed maxims of their Law.

In this manner it was that the Œginetans, brought in captivity from Thyræa in Laconia to Athens, were all of them executed in cool blood. Nor, as might be expected, did they here, or in a variety of other inſtances, do any thing not warranted by the example of their enemies. The Spartans at the ſurrender of *Platæa*, purſued the ſame bloody maxims, and revenged themſelves after the battle of Œgos Potamos, by executions equally as barbarous and unjuſtifiable, as thoſe ordered by their inhuman rivals. Through the whole progreſs of the war, indeed, the ſame ſpirit is to be diſcovered; and wherever the Merchant Ships of Enemies or even neutral Powers were met with, the uſual mode was to put the crews to death.

Slavery was univerſally allowed among them, and a more diſguſting picture than that which it preſents to us, is ſcarcely to be met with.

The circumſtances indeed which attended the *Lacedæmonian* Slavery, are ſhocking beyond conception; nor of all the examples of cruelty and wickedneſs, which ſtain and diſgrace the annals of mankind, can any thing be found more horrid, or more revolting to nature than the κρυπτία, or ſecret Law of the Spartans. By this, when the Helotœ or Slaves, became ſo numerous as to give umbrage to their Maſters, it was allowable to thin them by death, and that

that in a manner the moſt miſerable, on account of the apprehenſion of it in which they muſt always have lived. Some of the ableſt of the young Men were diſpatched privately into the country, armed with daggers and taking with them a little neceſſary proviſion. Theſe, in the day time, hid themſelves in the Thickets and Clefts, and in the night iſſued out into the highways, and murdered all the Helots they could light upon. Sometimes however they ſet upon them in the day, while at work in the fields, and thus in the very act of procuring proviſion for their Maſters. (*i*)

Such barbarous actions however, though they may give a ſhock to our compaſſion do not move our wonder or indignation, ſo much as thoſe deliberate violations of reaſonable and natural juſtice, which we might have expected any where but in that country which, from the number and eminence of its philoſophers, ought to have been nicely accurate in it's maxims concerning right. "It appears," ſays a modern author, who has ably delineated their policy and hiſtory, "to have been very generally held among the Greeks of that age, that Men were bound by no duties to each other *without ſome expreſs Compact.*" The property of Foreigners might be any where ſeized, and themſelves condemned to ſlavery. or even put to death without any breach of human Law; and ſo far from any breach of divine Law, that prayers were addreſſed to the Gods for favour and aſſiſtance in the commiſſion of ſuch violences.

Thoſe connected with them by ſocial compact they deſcribed bya term peculiar to themſelves, ENSPONDI; meaning originally, perſons with whom they had poured wine to the Gods, as a proof of their Compact. Thoſe who had forfeited their claim to the benefit of this ſort of alliance, were called

(*i*) Potter's Antiq. 1. 619.

ECSPONDI,

ECSPONDI, that is, *Out of Compact*, or Out-laws. Upon the ſurrender of Platœa to the Spartans, the Commiſſioners of the latter determined that their priſoners were ECSPONDI; they were aſked one by one, whether in the preſent war they had done ſervice to the Lacedæmonians; and anſwering in the negative, they were ſeverally led aſide and put to death to the number of two hundred Platœans and twenty-five Athenians. (*k*)

We may here obſerve a remarkable ſimilarity between this mode of proceeding and that of the Commiſſioners of the French Convention, towards thoſe of their own Nation taken in war, whom they condemn (and in this they are not inconſiſtent) as guilty of Treaſon. In ſuch tranſactions therefore, the Greek Law of Nations conſidered the Subjects of one State in open hoſtility with another, in the ſame point of view, as modern Nations conſider thoſe that are guilty of *Treaſon*; which, as there was no allegiance due, was the ſummit of Injuſtice.

So much then for the Greek Law of Nations; we will now turn to the Romans, who, it muſt be confeſſed, preſent to us a picture ſomewhat more regular.

Many of their Inſtitutions, as well as many facts of their Hiſtory, prove to us that they went far beyond their rivals, in this Science. Nor can it be ſaid that they improved upon the Grecian Law, ſo much as they had an original one of their own, ſuperior to the other in regularity and equity.

So early as in the hundred and fourteenth year of their State, when ANCUS MARTIUS is ſaid to have begun his reign; a Ceremony was inſtituted among them which would do honour to the wiſeſt and moſt poliſhed of the modern Nations; I mean their famous mode of declaring War. That Prince is de-

(*k*) Mitford's Hiſt. of Greece, C. 15. S. 7.

ſcribed

ſcribed by Livy as of a genius between that of Romulus, and Numa; and as the latter ſoftened the rugged minds of his new People by the Ceremonies of Religion; So Martius wiſhed to temper their Valour with Juſtice, by the inſtitution of Ceremonies in War. Whenever therefore the State had cauſe of complaint againſt another, a Herald, called the PATER PATRATUS, or Chief of the College of Heralds, was firſt ſent to the frontiers of the offending Nation to demand redreſs; and if within thirty-three days, juſtice was not done, then, and not till then, they were to be conſidered as Enemies and purſued with fire and ſword. Notice of this even was, after all, to be given, by the return of the ſame Herald to the Frontiers and caſting a Javelin into the hoſtile Territory. (*l*)

So much generoſity in an infant and precarious Nation, promiſed many intereſting and magnanimous actions in the courſe of their Hiſtory afterwards; and accordingly, without meaning to go into the compariſon of their examples of patriotiſm with thoſe of Greece, we ſhall not be far wrong in ſaying that they exhibit much greater inſtances of regular Law, in their intercourſe with foreign Nations. Theſe are for the moſt part ſo well known, that it would be unneceſſary as well as tedious to dwell on them; many of them however ought on this occaſion to be ſet forth, as it proves them to have had very ſtrong and ſuperior ideas, of the duties which Nations owe to one another. Some of them indeed will for ever form the baſis of many modern queſtions; As the tranſaction of *Poſthumus* with the *Samnites*, the celebrated epoch of the *Caudine Forks*. The diſavowal of this General's conduct by the Senate; their offer to ſend him back; the refuſal of the Samnites, and the conſequent arguments on both ſides, (*m*) furniſh

(*l*) Tit. Liv. L. 1. C. 32.
(*m*) Vid. Cicer. de Offic. L. 1. C. 11.

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the matter for the very intereſting and important part of modern Juriſprudence, called the SPONSIO, about which there are ſtill various opinions. (*n*)

Their notions alſo of military Law, in regard to foreigners, went in ſome reſpects as far as our modern refinements. There are, ſays Cicero, certain duties to be complied with even towards thoſe who have injured you; and in puniſhing, and avenging, there is a particular mode to be obſerved, which gives riſe to the Laws of War. (*o*)

Amongſt theſe Laws it ſeemed to be laid down, that no Roman could fight even for his country without a commiſſion, which in all reſpects is ſimilar to the modern notions, that thoſe who ſo fight may be puniſhed as Robbers. (*p*)

In compliance with this therefore, when the younger *Cato* was diſmiſſed by *Pompilius* from his Province, with the reſt of the officers of his Legion, and wiſhed to remain behind for the reſt of the Campaign; his Father wrote to *Pompilius*, deſiring him to adminiſter the military Oath to his Son, de novo; as the legion in which he had ſerved was no longer under his command.

The letter alſo to his Son, lays it down that it was contrary to Law for one *not a Soldier* to fight with an Enemy. (*q*)

The ſpirit of the reſt of their Laws of War, was generally of the ſame regular caſt; we ought not, ſays CAMILLUS, (at a time when their civilization was comparatively backward) to aſpire ſo much at victory, as to endeavour to avoid the infamy of obtaining it by baſe means; (*r*) and one of their earlieſt

(*n*) See Vattel. 2. 14. 209. (*o*) Cicer. de Offic. L. 1. C. 11.
(*p*) Vattel, D. des G. L. 3. S. 226.
(*q*) Negat enim jus eſſe, qui miles non ſit, pugnare cum hoſte. ——Ib.
(*r*) Plutarch, Vit. Camill.

maxims,

maxims was, that they ſhould wage war with not more valour than juſtice. (s)

It was a compliance with theſe principles that gave birth to many of their moſt virtuous, if not their moſt brilliant actions: that *Clelia* was ſent back to *Porſenna*; that *Regulus* returned to *Carthage*; and thoſe who treated of an exchange of priſoners after the battle of *Cannæ*, to *Hannibal*; that *Fabricius* refuſed to aſſaſſinate *Pyrrhus*; and *Camillus*, to receive the children of the *Faliſci*.

A ſenſe alſo of the neceſſity of enforcing ſuch doctrine upon others, produced from them many ſeverities toward foreign Nations; and the utter deſtruction of one of the nobleſt Cities of GREECE was profeſſedly the conſequence of her having infringed the rights of Ambaſſadors.

Theſe rights themſelves formed one of the moſt remarkable features of their Law, and are deſervedly celebrated as being better underſtood by them than by any of the antient Nations. Indeed the very exiſtence among them of a *College* of *Heralds*, to preſide over and expound rules, expreſsly drawn up for their conduct toward foreigners, beſpeaks them a People far advanced in the Law of Nations conſidered as a ſcience.

With all their ſuperiority however, they gave into the rugged notions which the want of a milder religion, and conſequently a more equitable ſyſtem of morality, made them imagine nothing more than juſt; and though they poſſeſſed magnanimity beyond moſt others, yet they were generally cruel, and in many reſpects ungenerous.

Of this, the whole plan and ſcheme of their TRIUMPHS are an example. To depreſs an enemy in his ſpirit and pride of mind, (the only conſolation he has

(s) Juſtique ea, non minus quam forte didicimus genere.—— Liv. L. 5. C. 27.

left, when his ſtrength and his power are annihilated;) To debaſe and mock his condition becauſe we fear it no longer; To exhibit him to a gazing, ferocious, and ſometimes, deſpicable multitude; an example of the uncertainty of fate, or perhaps (what is infinitely worſe for his own feelings) of miſconduct, and perſonal imbecility; is ſurely to add inſult to injury, and to ſharpen unneceſſarily the ſtings of misfortune. Yet to do this, was the higheſt ambition, and almoſt the higheſt reward of a Roman General. The captives of his arm were led a miſerable inſtance of fallen grandeur, behind his Chariot Wheels; and the higher their rank, their power, or their character, the greater the triumph of their inexorable Conqueror. Death itſelf by the Executioner in priſon, was even ſometimes the cloſing ſcene of this inhuman ſpectacle; a puniſhment which after ſuch humiliations, was rendered ſurely leſs than ever neceſſary, either as a matter of policy or revenge. *(t)* The utmoſt ravage and bloodieſt conduct in open and doubtful war, is perhaps more ſupportable than ſuch a ſyſtem. *(u)*

Nor

(*t*) The following animated paſſage from the Speech of Vibius Virius againſt the Romans, will ſufficiently prove to us the ſavage inhumanity of their proceedings towards priſoners. "Cruciatus contumeliaſque quas ſperat hoſtis, dum liber, dum mei "potens ſum, effugere morte, præterquam honeſta, etiam leni, "poſſum. Non videbo APP. CLAUDIUM & Q. FULVIUM *victoria inſolenti ſubnixos*; neque vinctus per Urbem Romam, triumphi ſpectaculum trahar, *ut deinde in carcere, aut ad palum "deligatus, lacerato virgis tergo, cervicem ſecuri Romanæ Subjiciam.*

Liv. L. 26. C. 13.

(*u*) See PLUTARCH's account of the Triumph of Paulus Æmilius. After the greateſt diſplay of acquired riches, there came, ſays he, the king's Children led captives, and with them a train of Nurſes, Maſters, and Governors, who all wept and ſtretched forth their hands to the Spectators, and taught the little infants to beg, and intreat their compaſſion. After theſe came Perſius himſelf,

Nor were they leſs free from reproach, when ſharpneſs of mind, rather than ſtrength of arm, was neceſſary for their intereſt; when, for example they came to negotiate, to make, and to interpret Treaties. They here exibit inſtances of chicanery, any thing but conſiſtent with that magnanimity and force of ſoul, which were peculiar to them on other occaſions. Of this, nearly the whole of the third Punic War, particularly their laſt tranſaction with Carthage; and the quibble of QUINT. FABIUS LABEO, to deſtroy the Fleet of Antiochus, are memorable examples. (*v*)

The whole courſe of their hiſtory indeed, marks them a people determined to purſue their own great object, of dominion, by every mode, generous or ſubtile. They were as crooked in the cabinet, as they were energetic in the field; and the conduct of the Senate for ages together, has been celebrated as a maſterpiece in politics, in a ſenſe even *Machiavelitian*.

I do not mean to ſay that the inſtances which may be ſelected from their hiſtory, of bad faith, and improper interference in the affairs of other Nations; of open violation of the rights of neutral powers; and of public plunder and robbery which every where characterize them, (*w*) were not often blamed by their own writers, or may not be equalled by the conduct of very modern and enlightened Nations. But in the latter caſe, whatever may be the effect of *pow-*

ſelf, clad all in black. He looked like one altogether aſtoniſhed and deprived of reaſon through the greatneſs of his misfortunes.
Plut. in Vit. P. Œmil.

Perſius afterwards deſtroyed himſelf in priſon.

(*v*) Antiochus being defeated by that General, agreed to give up to him one half of his Fleet. The manner in which the Roman executed the Treaty, was by cutting every Galley in halves, and thus depriving him of the whole.
Valer. Max. L. 7. C. 3.

(*w*) See the Comments of Monteſquieu upon theſe parts of their Hiſtory.——Grand and Decadence des Rom.

er in commanding ſubmiſſion, it is always well known when the Law of Nations is broken; cotemporary States are appealed to, and the cauſe is tried, in argument at leaſt, by known principles and ſettled rules. Of this mode of proceeding the Antients, either knew nothing, or did not make uſe of it; which warrants a fair inference, that what was thus done, was not conſidered as an infraction of law. It is the more warrantable, becauſe of all the nations of the world, none ever paid a more religious, or indeed ſuperſtitious deference, than the Romans, to the force of promiſes and oaths; a point of their character which ſtands foremoſt in the numerous and able critical diſquiſitions, to which the actions of this wonderful people have ſo often given birth.

But whatever was their inhumanity, or the bad faith of their government towards foreign princes, in their progreſs to dominion; their conduct towards the bulk of the people they conquered, was for the moſt part exemplary, and far different from that which we have noticed of the Grecians. To civilize by conqueſt; to melt down and incorporate the ſubdued Nations with their own, and derive aſſiſtance from them, as from their fellow Citizens, in future attempts againſt others; was a great part of their policy. But to act thus, was directly contrary to that revengeful and bloody ſpirit which diſtinguiſhed the Grecian Politics. And accordingly we find, that after having puniſhed, or got rid of the CHIEFS of the Nations they ſubdued, the people for the moſt part were left in the enjoyment of their religion and cuſtoms, much of their property, and often of their very Government itſelf. (*x*)

This

(*x*) I am aware of many inſtances of ſeverity towards priſoners, which may ſeem to militate againſt this poſition; particularly that of the Teutonic women, who, upon the defeat of their huſbands by Marius, ſent a deputation to that General, to ſtipulate for

This principle of action, poſſibly took its riſe from the accidental conduct which they were obliged to purſue on the firſt foundation of their State. A handful of people brought together on the hazard; without connection, almoſt without territory, and abſolutely without wives; could not purſue thoſe inexorable maxims which regular and long eſtabliſhed States fell into. At leaſt they could not expect to be rapid in their augmentation, except by the very mode which the policy of Romulus dictated; and once begun, they might continue it from habit alone, if not convinced by experience of its ſuperior benefit.

This however has been differently accounted for by a writer of reſearch and learning of the preſent time.

In conſidering the various effects upon the Law of Nations which are produced by different modes of life, Dr. *Falconer* refers this variation between the Greek and Roman Law, to the manner of living in the two countries. In the *Savage* and the *Shepherd* States, ſays he, much land is neceſſary for the maintenance of the people; and when one People is conquered by another, the deſire of encreaſing their quantity of food by the acceſſion of their territory, makes the Conquerors thin the inhabitants by military execution. On the other hand, where agriculture prevails, as much leſs land is neceſſary, there is no reaſon why the priſoners ſhould not enjoy their lives, when there is enough for their ſupport. It was not then extraordinary, that the Romans whoſe agricul-

for the ſecurity of their chaſtity and freedom, but were refuſed, and voluntarily inflicted death upon themſelves and children.—— Flor. L. 3. C. 3.——But it muſt be remembered that this related only to an Army which had juſt fought, not to a people conquered. Theſe Teutones had no country; they were in queſt of one; and there was therefore no reaſon of policy, why they ſhould not comply with the maxims of the time, which, with reſpect to the ſlavery of priſoners, were the ſame among the Romans as among the Greeks.

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ture could maintain additional numbers, ſhould receive their priſoners into their Society; while the Greeks who in ſeveral reſpects were in a ſituation ſimilar to the people formerly deſcribed, *(thoſe in a ſavage and ſhepherd State)* fell naturally into more ferocious maxims.

He goes on to prove this latter poſition, by the number of Colonies which Greece ſo often ſent forth; a ſure mark that there was not enough for their maintenance at home. (*y*)

Now I own this reaſoning appears by no means ſo ſtrong as to produce conviction. For in the firſt place, *Commerce* as well as *Agriculture* will produce food, if not in as great a degree in very rich ſoils, yet in a much greater one, in ſoils comparatively barren, and if the ROMANS were Huſbandmen, they deſpiſed commerce. The GREEKS (particularly the ATHENIANS and CORINTHIANS) not only did not deſpiſe *agriculture*, but roſe to great eminence in *commerce*. Many of their anceſtors came from PHOENICIA and from EGYPT; and the commercial ſpirit of the one, and the agricultural ſpirit of the other, would in their new ſettlements find ample room for the exerciſe of both. For while the great length of their Coaſt, their numerous Harbours, and the multitude of Rivers, with which their whole Country was interſected, held out the greateſt incitements to Trade; the fertility of a number of their provinces, equally incited them to a vigorous cultivation.

The face of the country has been accurately delineated by their own writers, and their accounts have been well collated by modern critics—and though ARCADIA, DORIS, ÆTOLIA, and ATTICA, are deſcribed as extremely mountainous; yet the latter is ſaid to have been fertile in Olives and Figs; and the

(*y*) Falconer on Climate, B. 6. C. 3.

vales

vales of THESSALY, BOEOTIA, LOCRIS and PHOCIS, and particularly ARGOS and MESSENIA, were fruitful in corn to a degree of celebrity.

With reſpect to the colonies ſent out by the GRECIANS, the argument, does not perhaps apply ſo much to them as to the ROMANS themſelves, whoſe colonies were a well known political inſtrument for ſubjugating foreign Nations, and extended far and wide.

But the reaſon againſt this opinion which, it ſhould ſeem, ought naturally to have moſt weight, is drawn from the high ſtate of perfection to which the Greeks attained in all the refinements of Art and Science; and which even, while they were forced to crouch under the ſword of their rivals, rendered them ſtill ſuperior not only to their conquerors, but to all the world.

Such refinement however is totally inconſiſtent with the ſavage, or ſhepherd ſtates; for men do not commonly attain, even to a moderate degree of merit in the Arts, till leiſure has been afforded for the diviſion of profeſſions and of labour, by the eaſe and certainty by which ſubſiſtence may be acquired.

We pretend not however to account, farther than we have done, for this marked difference between the Greek and Roman Law of Nations;—contenting ourſelves with obſerving the fact, as a ſtrong corroborative proof of our point, that the Law in queſtion, is only that which obtains among a particular *Claſs* or number of States. The Towns of Italy and of Greece lie nearly in the ſame latitudes: between Brunduſium and the Acro Ceraunian Promontory, there is not more than one degree of longitude; and between Rome and the Ionian Nations, (nearly the extreme points of the two claſſes of People) not quite ſixteen degrees; the ages of their Republics were almoſt the ſame; the time at leaſt when the

Roman

Roman maxims were moſt inculcated, and the improved ſtate of Greece, were abſolutely cotemporary, (z) and in their religion any eſſential variation is not eaſily diſcovered; yet ſo marked, and ſo deep is the line of difference, which we find in their Laws of Nations.

Such then was the character of the Law among theſe two remarkable SETS of PEOPLE, till the one was incorporated with the other by conqueſt, and both together yielded at laſt to a deſtiny, which for a long time covered the whole European World with miſery, and darkneſs.

(z) There were not forty years between Alcibiades and Camillus.

CHAP.

CHAP. VII.

THE PRINCIPLE OF THE SCANDINAVIAN LAW OF NATIONS.

IN that unfortunate period, when the populous North poured forth her multitudes to overwhelm the far famed Miſtreſs of the World; when every thing that was elegant, and every thing that was wiſe, gave way to the rugged ignorance, and deſtructive fury of our Scynthian Anceſtors; the Laws of all kinds as well as the diſcipline of the Romans were loſt amid the general uproar. The Scandinavian ſwarms, conſumed, or ſwept off, every thing that came in contact with them; the old Nations melted away; no veſtige of former civilization was left, and the little humanity or order that had been cultivated, fled from before a people who deſpiſed, or never had been acquainted with them. A new *Set of Nations* therefore got poſſeſſion of the World; and a change in notions and manners; a different language, and a different Religion, were introduced.

Theſe new Maſters of EUROPE were of the moſt rugged caſt; they delighted wholly in blood; war was their paſtime, and ſlaughter their feaſt; and theſe manners, generated perhaps at firſt by the climate, were confirmed by their Religion. (*a*)

(*a*) See a full account of their Characters and Inſtitutions in Cæſar and Tacitus; Pelloutier. Hiſt. des Celtes. Mallet's North. Antiquities. Temple on Heroic Virtue. Bartolin. de caus. contempt. Mort. Gibbon's Account of the Scythians: Decl. and Fall. ch. 26. and the elaborate Notes of Robertſon. Introduc. to ch. 5.

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The preſent Nations of Europe are ſaid to ſpring from two claſſes of people; the CELTIC and the SARMATIAN; in their race very different, and in their religious notions by no means the ſame. The firſt gave origin to the Gauls and Britons; the laſt to the Scandinavians or Goths. The former of theſe, as is well known, were taught certain myſteries by the DRUIDS which are now impenetrable from the loſs of the documents that contained them; (*b*) the latter were abſolute Polytheiſts, which may be gathered from various monuments that remain. (*c*) In thoſe points however which could at all influence their public characters, or the ſyſtem on which they proceeded towards other nations, there was a terrible ſimilarity between them. Both of them believed in the immortality of the ſoul, taught to the one by the Druids; to the other by ZAMOLXIS; and both endeavoured to deſerve Elyſium in a manner equally horrid to themſelves and dangerous to their neighbours; ſince they concurred in imagining that violent death was the only paſſage to Paradiſe.

It is wonderful under this influence to what a height they carried their contempt of life; inſomuch that death, and that, in its moſt violent form, ſeemed to be an object of their courtſhip, and he who died of old age was covered with infamy. To die with his arms in his hands, was the vow of every free man, and the pleaſing idea they had of this kind of death, led them naturally to dread the thought of periſhing by diſeaſe or old age. Hence

(*b*) The Britiſh Druids taught their myſteries in verſes which their followers were ſometimes twenty years in learning. Cæſar De Bell. Gall. C. 13 Theſe are entirely loſt.

(*c*) They are very authentic, and were brought together into two collections called the Edda, by SÆMUND SIGFUSSON, born in 1957, and SNORRO, Judge of Iceland, in 1225. (See the North. Antiq. 2. 21, 22. Preſ.)

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in their legends and poems, the warriors as they fell in the field, are reported to die ſinging or laughing; (*d*) and hence when by accident, (which more poliſhed men would call lucky, but which they deemed a misfortune,) any of them advanced in ſafety to years, in ſpite of the perils of war, the cuſtom was to deſtroy themſelves, either by their own hands, or by being carried into a field of battle, or by having recourſe to the kindneſs of their friends to perform this acceptable ſervice for them. (*e*)

Sometimes they threw themſelves down precipices into the Sea; and in Sir William Temple's time, there was ſtill in Sweden a place called ODIN'S HALL, the name of which was preſerved as a memorial of this ferocious cuſtom. It was a great bay in the Sea, encompaſſed with ſteep and rugged rocks; and they hoped by the boldneſs of ſuch a violent death, to renew their pretence to an admiſſion into the hall of their founder and ſupreme God, which they had loſt

(*d*) King RENGER, who died ſinging the pleaſure of death in a field of battle, cries out at the end of a Stanza, "The hours of "my life are paſſed away, I ſhall die *laughing*." The concluſion of Eulogy of a king of Norway is, "Hereafter it ſhall be recorded in hiſtory that king HALFER died *laughing*;" and in praiſe of a man who died in ſingle combat, as recorded by Saxo Grammaticus, it is ſaid that he feel, *laughed*, and died.—North. Antiq. 1. 207.

(*e*) Northern Antiquities, 1. 200.

There are in the ſame book, ſeveral curious inſtances of this contempt of the pains of death. A young warrior of Jomſbourg, in Pomerania, having been made priſoner, and led to execution after the cuſtom of the time, begged that he might not be led to puniſhment like a ſheep, "Strike the blow ſaid he to "his executioner in my face, I will ſit ſtill without ſhrinking, "and take notice whether I once wink my eyes, or betray one "ſign of fear in my countenance."

Another warrior having been thrown upon his back in wreſtling with an enemy, and the conqueror being without arms to diſpatch him, the vanquiſhed man promiſed to wait quietly in that poſture, till the other went for a ſword to kill him, and he faithfully kept his word. Id. 1. 205, 207.

by

by failing to die in combat, and with their arms. (*f*)

There was however this difference between the notions of paradiſe among the two people; that the CELTS imagined thoſe who died of natural deaths, were merely *deprived* of happineſs; while the SCANDINAVIANS *puniſhed* them " in caves under ground, all dark and miry, full of noiſome creatures, of ſtench and miſery. (*g*) The enjoyments of the one were alſo more mild than the other; the CELTS paſſing to what they called FLATH INNIS, or the Noble Iſland, which is deſcribed as green and flouriſhing: (*h*) The Goths to the palace of ODIN, who to uſe Sir William Temple's expreſſions, eternally kept open houſe for all ſuch Gueſts, where they were entertained at infinite tables, in perpetual feaſts and mirth, carouſing, every man, in bowls made of the ſkulls of enemies. (*i*) The modes of worſhip among both races were however, horrible to the laſt degree. The Druids ſacrificed priſoners of war by hundreds, by placing them in gigantic idols made of wicker, and burning them to aſhes. The inhabitants of *Coerland* are ſaid to have been a cruel race, whom all others avoided, " propter nimium Idolatriæ cultum; (*k*) and thoſe of *Eſtland* to have been worſhippers of Dragons and Birds of prey, to whom they offered up living men, bought of the merchants, and were particularly nice in chuſing out thoſe of peculiar beauty. (*l*)

Hence

(*f*) It was related to Temple, by Count Oxenſteirn, the firſt of the Swediſh Ambaſſadors at Nemeguen. See Temple's Miſcellanea, Part 2. Eſſ. 3. on Heroic Virtue, and North. Antiq. 1. 210.

(*g*) Temple on Heroic virtue.

(*h*) Macpherſon's Introd. to Hiſt. of G. Britain.

(*i*) Temple on Heroic Virtue.

(*k*) Adam. Brem. de ſitu Dan. 12.

(*l*) Nam et ipſi Deum chriſtianorum prorſus ignorant. Dracones adorant cum volucribus, quibus etiam vivos litant homines, quos

Hence then it appears that it was a point of their very *Religion*, to become familiar with ſlaughter; and it was not merely their diſpoſition, but their bounden duty, to ſpread about them far and wide, what Chriſtianity teaches us to conſider as the moſt afflicting of evils. The Heroes, ſays the Edda, have every day the pleaſure of arming themſelves and cutting one another in pieces, but as ſoon as the hour of repaſt approaches, they return on horſeback, all ſafe and ſound. (*m*) In this frightful Mythology alſo, their God ODIN, is called "The terrible "and ſevere God; the father of ſlaughter; the "God that carrieth deſolation and fire; the active "and roaring Deity; he who giveth victory, and re-"viveth courage in the conflict; who nameth thoſe "that are to be ſlain." (*n*)

It will be not leſs agreeable than curious to obſerve, as we ſhall do in the courſe of this work, how the horrors of theſe cuſtoms came to be loſt, amid the altered manners of Europe; and how the very language of nations when they ſpoke to one another in their Treaties and public inſtruments, was expreſſive of a ſpirit the moſt mild and the moſt oppoſite to what has been recorded.

Upon the whole then it follows plainly, that with ſuch maxims and morals, not only the municipal cuſtoms, ſuch as they might be, but the Law of Nations of the Northern people, muſt have been far different from that comparatively regular one of the Romans, of which we have been recounting the particulars. Their rules of Right, indeed, far from checking their dreadful and murderous inclinations, were themſelves ſo warped and adapted to them,

quos a mercatoribus emunt; diligenter omnino probatos ne maculam in corpore habeant, pro qua refuſtari dicuntur a draconibus. Id. 13.

(*m*) North. Antiq. 1. 120.

(*n*) Id. Ib. 1. 86, 87.

that

that they gave them freſh force. They looked upon war, ſays M. Mallet, as a real act of juſtice, and eſteemed ſtrength as an inconteſtible title over the weak; as a viſible mark that God had intended to ſubject them to the ſtrong. They had no doubt but that it was the will of the divinity to eſtabliſh the ſame kind of dependance in this reſpect, as among other animals; and ſetting out from the principle of the *inequality* of mankind, as modern Civilians proceed from the principle of their *equality*; they inferred that men had no right to what they could not defend, and this maxim therefore formed the baſis of their law of nations. (*o*) Accordingly, they made open war upon all the order and regularity that were known; and within a very few years after the firſt irruption, of this bloody race, a complete revolution in Law, as well as in every thing elſe, took place throughout Europe. The Roman people, language, and manners, paſt wholly away; and with them paſt away the Roman Law.

From this time therefore we muſt begin as it were anew; and conſidering the world again in its infancy, or if you will, in a ſavage *ſtate* of *Nature*; we muſt watch its progreſs once more from ferocity to civilization; until from the moſt lawleſs habits, we perceive it, under the influence of a milder *Religion*, together with various local circumſtances, advancing in this part of Juriſprudence, to comparative perfection.

(*o*) North. Antiq. 1. 200.

CHAP.

CHAP. VIII.

THE HISTORY OF THE LAW OF NATIONS IN EUROPE, FROM THE FALL OF THE ROMAN EMPIRE TO THE ELEVENTH CENTURY.

THE peaceful and well protected Inhabitant of a modern *European* State, will ſhudder at the picture which is now about to be ſet before him. More particularly the happy native of Britain, will have reaſon to rejoice that he lives in different times, and from the fortunate ſituation of his ſoil, removed from ſuch horrors of war, as we are about to record, ſhould the world be ſo unfortunate as to ſee them revive. The law which we are now going to contemplate is nothing but a chain of the moſt cruel maxims; and as all ideas of principles or ſcience, ſeems to have been baniſhed, or rather never to have been entertained; to ſhew what were the precedents which the Law ſupplied, will be merely to recount a ſeries of bloody and ſavage cuſtoms.

THEODOSIUS may be ſaid to have been the laſt of the Emperors, who ſwayed the Roman Sceptre in its full power and luſtre. The diviſion of his mighty domain into two Empires under his immediate Succeſſors; if it was not the cauſe, was at leaſt the ſignal for the torrent of Barbarians to burſt from their mounds which broke down the whole force of the Roman power, and ſeparated the world into new States. (*a*)

(*a*) —— Scanzianorum in reliquas mundi partes expeditiones, et quaſi inundationes, &c.—And Bur. Suec. Deſcrip. 2.

In

In the very beginning of the reign of ARCADIUS and HONORIUS, we find the repeated attempts of the Barbarians growing effectual; and long before the middle of the fifth century, we may obſerve the foundation of the modern kingdoms of Europe, among the provinces deſolated by the different tribes of *Goths*, *Vandals*, *Burgundians*, and *Franks*.

Eighty years ſufficed to deſtroy even the name of the Weſtern Empire, and to reduce the remnant of its power to the mere kingdom of Italy, under the Herulian Chief. (*b*) A century more brought down upon theſe devoted people; the *Huns*, the *Avars*, and the *Saxons*, in order to complete the ruin which others had begun.

The laws of war of thoſe terrible Conquerors, may be known by their effects. The Romans were not merely ſubdued, but annihilated; their Cities did not ſimply paſs from old, to new maſters; but they were abſolutely reduced to a confuſed heap of ruins. The ſlight ſketch already given of the religion and manners of many of the parent nations, may in ſome meaſure account for theſe bloody maxims; and it muſt be owned that the deſcendants of ODIN were not unworthy their inexorable anceſtor.

Whether from the principles of ſuch a religion; the hatred they bore their Enemies; their love of booty; or the mere ſavageneſs of their diſpoſitions; their courſe was every where marked with a deluge of blood; and extermination ſeemed ſo entirely their object, that they have been not improperly likened to wild Boars. (*c*) Gibbons compares the *Huns* of Attila, to the Moguls and Tartars, in their moſt ſavage ſtate; and if the compariſon be juſt, miſerable indeed muſt have been the ſituation of mankind. Among the latter, the abuſe of the rights of war

(*b*) ODOACER was the firſt *King* of Italy, in the Year 476.

(*c*) Partim naturam populi ſuetam prælio, et fugientem diffidia, *inſtar aprum*.—And. Bur. Suec. des. 2.

was

was exerciſed with a regular form of diſcipline. Whenever a City was reduced to ſurrender at diſcretion, the inhabitants were aſſembled in ſome adjacent plain, and a diviſion was made of them into three parts. The ſoldiers and young men were either enliſted among their Conquerors, or maſſacred on the ſpot: the young women were reſerved for other purpoſes; and the old and infirm alone were allowed to live, paying a tax. (*d*)

This was the conduct, when no extraordinary rigour was ſhewn; but the moſt caſual provocations; the ſlighteſt motive of caprice or convenience, involved the whole in an indiſcriminate ſlaughter; and to uſe their own expreſſions, "Horſes might run without ſtumbling, where houſes and cities had once ſtood. (*e*) In conformity with theſe manners, we find their hiſtory, a hiſtory of blood. Above four millions of perſons were ſaid to have been ſlaughtered by TAMERLANE; ATTILA is eſteemed his counterpart, and may therefore be held to have deſerved the horrible appellation of the ſcourge of God, which the Scythian Savage was pleaſed to aſſume among his other titles. (*f*) But excluſive of the victims which fell before him; the waſte made by the Barbarians was computed to amount to more than ſix millions of ſouls, during the thirty-two years alone which JUSTINIAN reigned; and inſtances might be multiplied upon inſtances, to ſhew that the cruelty of the detail was equal to, if it did not

(*d*) Vie de Gengiſcan par La Croix paſſim.

(*e*) Gibbon, Dec. & Fall. ch. 34.

(*f*) Attila is thus deſcribed by the author of the Reſpublica et Status Hungariæ, p. 102. "Omniaque Cædibus atque incendiis "miſcens, tantum ſui terrorem excitavit, ut vel ad nomen ejus, "nod aliter quam furiæ cujuſdam orco progreſſæ omnes Nationes "contremiſcerent." We may indeed judge of the ſlaughter of theſe wars, when 180,000 men are ſaid to have perished on Attila's ſide alone, at the ſingle battle of Toloſa.—Id. p. 103.

ſurpaſs the horrors which the groſs ſum muſt imply. In the ſiege of *Topirus*, the Sclavonians maſſacred fifteen thouſand male priſoners; others of their captives were impaled alive; or ſuſpended between four poſts, and beaten with clubs till they expired; or incloſed in buildings and left to periſh by fire.—The *Thuringians*, after the defeat by ÆLIUS in the plains of *Chalons*, murdered their hoſtages as well as captives, and put to death two hundred young maidens, by tearing them aſunder by wild horſes, or cruſhing their limbs under rolling waggons: The *Avars*, after offering their captives to MAURICE at a low price, and being refuſed, deliberately cut their throats as uſeleſs merchandiſe. (*g*)

Such horrors gave riſe to Fables that were leſs unnatural than they may appear to the enlightened minds of modern enquirers. The Witches of SCYTHIA, who for their foul and deadly practices had been driven from ſociety, were ſaid to have copulated in the deſert with infernal Spirits; and the HUNS were the offspring of this execrable conjunction. The LANGOBARDS were ſuppoſed to have heads like thoſe of Dogs, and to reſemble thoſe fierce animals, not only in ſlaughtering, but in drinking the blood of their enemies. (*h*) Whatever the belief was, the effect of their rage was confeſſedly terrible; inſomuch that the fineſt and beſt peopled Provinces were rendered naked and barren; and Africa, which on account of its beauty and fertility, had been call-

(*g*) See Gibbon Dec. & Fall. chs. 35. 42.

(*h*) This is Jornandes' ſtory. Others, according to the Author of the Reſpublica et Status Hungariæ, derive them from the more claſſic origin of Fawns and Satyrs; others again from MAGOG the Son of JAPHET.—Reſp. et Stat. Hung. p. 36.

Many of the Inhabitants of the Baltic Iſlands were ſuppoſed to have heads like dogs, and all males brought forth by the Amazons, were imagined invariably to be of this form.—Adam. Brem. de ſitu Dan. 15.

ed

ed by a writer of the middle ages "Speciosítas totius "terræ florentis," (*i*) was reduced to a ſtate ſo dreadfully like that of a deſert, that according to the Hiſtorians, one might travel ſeveral days in it without meeting a man.

Nations that could make war thus terribly, would never be delicate in their ſelection of a cauſe. It would be even doing them injuſtice to ſuppoſe that they ſtood in need of any. The SCANDINAVIAN and GERMAN People, the Parents of all the reſt, were little accuſtomed to wait the ſlow returns of labour for ſubſiſtence, when they might acquire it by the ſword? nor would they condeſcend to raiſe that by the ſweat of their brow, which they could more eaſily obtain by wounds and blood. (*k*) It was uſual therefore among them on the approach of the Spring, to aſſemble and deliberate into what quarter they ſhould carry the war, as a thing of courſe. The hope of booty generally determined it; and it was only to be avoided by the payment of a tribute under the name of a preſent. Even before theſe tributes came to be regular, the withholding the preſents of mere ceremony, gave riſe to very cruel invaſions. That under ſo firm a ſoldier as VALENTINIAN, by the Alemanni, aroſe from the indignity of their Chiefs at the parſimony of a Roman Miniſter, who had leſſened the value of the preſent they were intitled to receive, on the acceſſion of a new Emperor to the throne. (*l*) That alſo the Arabs againſt the Soldiers of JULIAN, retreating from the Perſian war, originated from the ſame cauſe. (*m*)

(*i*) Victor.

(*k*) Nec arare terram aut expectare annum tam facile perſuaſeris, quam vocare hoſtes et vulnera mereri: pigrum quinimo et iners videtur, ſudore acquirere quod poſſis ſanguine parare.—Tacit. de Mor. Germ. 14.

(*l*) Ammian Marcell. 26. 5.

(*m*) See Monteſquieu's Reflections upon this ſort of Law of Nations. Grand. et Dec. ch. 18.

This precarious ſtate of the public ſecurity, almoſt naturally implies a general want of good faith. Examples of it are but too numerous during this unfortunate period, but which as they may be conſidered as *infractions*, need not to be mentioned. It was reſerved however for ſuch a ſtate of the Law of Nations, for a People making Treaties, *deliberately* to bind themſelves by a *previous* oath, to *break* the faith they were ſwearing to obſerve. This was ſuppoſed to be the caſe with the Gothic Nations ſettled by THEODOSIUS in Thrace, when they bound themſelves by treaty to defend that part of the Empire. (*n*)

In ſuch a State alſo, the diſtinctions between municipal Juriſdiction, and the national power, as it concerned Foreign Governments, could hardly be well underſtood,—and accordingly we find when MARCOMIR, a King of the *Franks*, had broken a treaty he had made with the Romans; he was not puniſhed by the order, and at the diſcretion of the Sovereign; (the only mode which could conſiſtently be purſued;) but was calmly ſummoned before the Tribunal of a Magiſtrate, and convicted and ſentenced, like a Subject who had broken his allegiance. (*o*)

The hope of booty being allowed among the fair cauſes for war; the cuſtom of exacting *Tributes* naturally followed; for in this ſituation of continued and univerſal hoſtility, nations could never be aware of the points of attack; and when every man armed himſelf againſt his fellow as a matter of courſe, it ſurpaſſed human courage, and human foreſight, to be always effectually upon their guard. Much firmer people therefore than the Romans, might not very

(*n*) See the quarrel of FRAVITTA and PRIULF, in the preſence of the Emperor THEODOSIUS, which againſt their will diſcovered to him their ſyſtem of treachery.—Gibbon ch. 26.

(*o*) Gibbon ch. 30.

naturally

naturally fall upon the expedient adopted by them and others, to deliver themſelves from theſe cruel evils. The eaſe however with which Tributes were granted, as naturally provoked new demands and new barbarities;—Thoſe exacted by the *Danes* and *Normans* are well known; and the cruel avarice of theſe mercileſs Robbers, (who were only complying with the received Law of Nations according to *them*,) has been pathetically deſcribed by various Hiſtorians. To give particular inſtances of their cruelty after thoſe already cited, would be as unneceſſary as they are diſguſting; it is ſufficient to obſerve, that in mere predatory expeditions, this ferocious people, who were only to be curbed by the commanding genius of CHARLEMAGNE, ſpread themſelves after his death, over Saxony, and Flanders as far as Mentz;—and after ravaging the coaſts, penetrated by the rivers into France; where they pillaged and burned her Capital, and the faireſt of her Towns, as far as the province of Dauphiny.—CHARLEMAGNE foreſaw and dreaded their progreſs, and is even ſaid to have ſhed tears, when he found them defying his name, and likely to break down the force of that order, which he ſeemed born to eſtabliſh. (*p*) It would be unneceſſary to attend their progreſs into Britain where they made themſelves maſters of the Throne itſelf; or to deſcribe the extent of their barbarities and robberies, which could only be got rid of by means equally deſtructive of regularity and law, a general maſſacre of them by the people they had outraged.

(*p*) See Velly. Hiſt. de France 1. & Mallet Northern Antiquities, 1, 245. et infr. there is a long and full account of them in Mezerai, & Guiccardini's Deſcript. of the Netherlands. ſub ann. 830, to 890. Even the ſtout William, in times far better regulated, was reduced to the humiliation of buying off the attacks of the Danes from his newly acquired kingdom.—Hoveden, p. 451.

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Had theſe horrors been merely the effect of a burſt of paſſion, or the heat of war; or conſidered as a direct infraction of Law; ſome conſolation might be derived to the lover of good order. But it is his peculiar unhappineſs to find that they were the mere effect of a compliance with *received* maxims, and a conformity with, what was conceived to be, no more than duty; for even independent of the convulſions produced by the irruptions of ſuch butchers as ALARIE, ATTILA and GENSERIE, the injuſtice of executions in cold blood ſeemed to be reduced to a ſyſtem.

Of this nothing is a ſtronger proof than the common mode of proceeding againſt unſucceſsful Generals when taken priſoners in battle. In thoſe unfortunate caſes, their deaths were regular and certain; and the horror is encreaſed when we conſider that the cuſtom prevailed long after *Chriſtianity* was introduced, and may be traced through a ſeries of years ſo connected and extenſive, that we are not able to point out the exact time when it ceaſed. We have ſeen its reception among the *Greeks*, and *Romans*; nor could it be expected that men leſs enlightened than they, ſhould exceed them in humanity. We accordingly find the Law in full force at various and diſtant periods.—In the year 366, upon the defeat of the Alemanni, their captive king was hung on a Gibbet by the Army of *Jovinus*.—In 406; *Radagaiſus* monarch of the Goths reduced by *Stillicho* to lay down his arms, after being for ſome time a priſoner, was ſhamefully put to death. Fifty years afterwards, the great and juſt THEODORIE himſelf, orders for execution, *Rechiarius* the conquered king of the Suevi; In 486. *Syagrius* the Roman Commander in Gaul, was defeated, and beheaded by *Clovis*; and in 532, the Burgundian *Sigiſmond*, overcome by the Sons of that Prince, was together with his wife and children buried alive in a deep well. Even the enlightened

lightened *Charlemagne*, who lived near three centuries after them, and whoſe genius has been juſtly ſaid to have gone beyond his age; is found calmly commanding four thouſand five hundred Saxons to be beheaded in cool blood, after having ſlaughtered the bulk of their nation in various battles.

The Laws which could permit ſuch deliberate executions, very naturally allowed as an act of mercy alone, what the more humane morality of modern times, has deſervedly driven from its Code. We muſt not therefore be ſurpriſed to find perſonal SLAVERY exiſting throughout thoſe Countries which admitted and brought into practice theſe maxims of blood; and the greater the number or the rage of hoſtilities, the more fruitful was the ſource of ſervitude.

It was often made the inſtrument of political advantage as well as of private wealth: After the defeat of *Chſroes* by *Juſtinmian*; ſeventy thouſand captives were led from the banks of the *Caſpian*, to form the ſettlement of the Iſle of *Cyprus*. The policy of *Charlemagne*, after an interval of above two hundred years, was of the ſame kind; and the half-ſubdued Soldiers whoſe allegiance he doubted in *Saxony*, became the faithful means of his defence in the provinces of *Friſeland*.

The ſtate of a Slave in thoſe times, was little better than it was under the Greek and Roman power. (*q*) The horrid inſtitution of the ΚΡΥΠΤΙΑ was indeed not known; but abſolute power of life and death was claimed by the Maſter; and the warrior who at one moment had defied his enemy in the field; followed him the next, as ſubſervient to his will, as the cattle which equally with himſelf, formed the eſtate of the Conqueror.

(*q*) Among the *early* Germans however, according to Tacitus, it was better. Melior Conditio apud Germanos quam Romanos. —De Mor. Germ.

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In proceſs of time, diſtinct claſſes of Slaves came to be inſtituted. Thoſe of talents or perſonal beauty, were reſerved for the ſervices of the family; thoſe, whoſe only qualifications were health and bodily ſtrength, were chained as it were to the ſoil, and ſold along with it as the means of its cultivation. They were conſidered indeed as a perſonal as well as a real property; the Engliſh law, in common with moſt others, dividing them into Villains regardant, and villains in groſs; the one fixed to the Soil (*adſcripti glebæ*,) the other annexed to the perſon of the lord; (*r*) and there are inſtances of great numbers of them being tranſported from one eſtate, and even from one province or kingdom, to another, (*s*) as will, or convenience directed.

To preſerve an empire thus proudly adminiſtered, we muſt not be ſurpriſed to find that a difference, even in moral worth, was made by the Law between the Lord and the Villain. Hence, the depoſition of a ſlave againſt his maſter in a Court of Juſtice, was never received; (*t*) hence alſo, that humiliating diſtinction which the Frankiſh Conquerors made between the equivalent demanded for the death of their relations when any of them were killed; and that paid for the death of the miſerable Gauls. (*u*)

The

(*r*) Littel. Sec. 181. Sir T. Smith's Commonwealth 3. 10. Spelman's Gloſſ. voc. Servus. "Germanorum inſtar erant noſtri Villani, a Servis multum diverſi; quidam erant *prædiales*; quidam, *perſonales*," &c.

(*s*) Chilperic ſent away whole families of Slaves from his farms near Paris into Spain; they were chained in waggons, a nuptial preſent on the marriage of his Daughter.

Greg. Tur. L. 6, C. 45.

(*t*) L. L. Sancti. Steph. Cap. 19. Reſp. et Stat. Hung. p. 179. Ediſt. Theod. 48. ap. Lendenbrog. 249.

(*u*) See the Salic and Repuarian Laws with Monteſquieu's reflection's; Eſp. des Loix, and Obſervat. ſur l'Hiſt. de Fr. par Mably. L. 1. Ch. 2. Alſo Gloſſ. de Du Cange, voce Servus, and

The exiſtence of Slavery, was long protected in Europe. We ſaw it univerſal before the Chriſtian æra; nor could it be expected that a new religion whoſe eſtabliſhment was accompliſhed under a cruel length of perſecution, and which looked for ſucceſs to inſinuation and conviction alone, ſhould immediately effectuate the reforms which it came only to recommend. *Chriſtianity* however, in conformity with its principles, claims the merit of having gone fartheſt towards the abolition of this debaſing Inſtitution. It is indeed the great, and almoſt the only cauſe of its abolition, in the opinion of GROTIUS, who lays it down that by the old Law of Nations, *the practice was perfectly legitimate*; (*w*) an opinion in which he is fully borne out by the univerſality of the uſage, both before and for ſome time after the æra of Chriſt. (*x*)

When however the milder doctrines preached by him, came really to be well underſtood and diſſeminated in their genuine purity; the effect upon this part of the then received Law, was viſible and permanent. The profeſſed and aſſigned reaſons for moſt of the charters of manumiſſion, from the time of

and Cap. 19 of the Leges Sancti Stephani. Reſp. et Stat. Hung. p. 103. It cannot be expected that in a work like this, our attention can be arreſted to conſider at large the condition of ſlavery in the middle ages; or if it could, the matter has already been too amply and too accurately inveſtigated to attempt it anew. It is enough to touch ſlightly upon the ſubject, in order to ſhew that it came within the Law of Nations of theſe times. The learned reader need not be told of a whole cloud of Antiquaries and Critics upon this part of the Cuſtoms of Europe.

For the Condition of the Saxons, however, *in England*, ſee much learning in Dr. Brady's Gen. Pref. to his Hiſtory, and Sir T. Smith. 3. 10.

(*w*) De Jur. B. et P. 3. 7. 9.

(*x*) The chief and moſt antient diviſion of men in the Codes of Juriſprudence in Germany, was into two ranks; the Freemen and the Slaves.

Heineccius Elem. Jur. Germ. L. 1. S. 21.

GREGORY

GREGORY the Great, to the thirteenth Century, were the religious and pious conſiderations of the fraternity of men, the imitation of the example of CHRIST, the love of our Maker, and the hope of redemption. Enfranchiſement was frequently given upon a death-bed, as the moſt acceptable ſervice that could be offered, and when the ſacred character of the prieſthood came to obtain more univerſal veneration; to aſſume its functions was the immediate paſſport to freedom. (*y*)

Long before this however, *Chriſtianity* had begun to perform its office in ſoftening the rough manners of the Barbarians; and though, as was natural, the ſavage underſtanding of a Goth, or a Scythian, might not be able to comprehend, or might perhaps at firſt deſpiſe the humane duties which it taught; yet he was inſenſibly led to reſpect, and afterwards to embrace a religion, which evidently tended to hold out protection to the unfortunate. *Alaric* in the midſt of the ſack and pillage of the richeſt City in the World, gave the ſtricteſt orders to reſpect the Churches of the Apoſtles; and what is more wonderful at that time, to ſpare the lives of the *unreſiſting* citizens. *Alaric* and many of his Goths, were *Chriſtians*; and in compliance with his commands, (or probably in the fervour of his own zeal,) one of his Captains in the moment of laying his hands on an immenſe hoard of plate, upon hearing that it was dedicated to the ſervice of *Saint Peter*, abſtained from his prey, and was immediately ordered by his Commander to replace it in the church.

(*y*) The enfranchiſement of Slaves in England aroſe moſt particularly from theſe principles of piety: The manner of it has been well deſcribed by Sir Thomas Smith (Commonwealth, 3. 10.) and Dr. Brady (Gen. Pref. to his Hiſt.)

For the manner and motives of enfranchiſement on the Continent, beſides Monteſq. Du Cange, &c. ſee particularly Heineccius Elem Jur. Germ. L. 1. Tit. 2. De Stat. Libertinorum, and the elaborate Note U of Robertſon, Ch. V. Introd. S. 1.

On

On a ſimilar occaſion, and in a moment of equal licenſe, *Luitprand*, king of the Lombards, on the point of plundering the ſame devoted City; liſtened to the voice of the Pope; withdrew his Troops, and performing his devotions at the ſhrine of the Apoſtle, reſpectfully made an offering of the enſigns of his command. (*z*)

A ſacrifice much more congenial with the genius of the new religion, was made by *Heraclius*. After the the defeat of *Choſroes*, fifty thouſand captives were releaſed by that monarch, conſiſtent with the ſpirit which to uſe his own words, made him devote his life *for the ſalvation of his brethren, to obtain in a crown of martyrdom, an immortal reward.* The dawning of the *Chriſtian* Law of Nations is alſo to be obſerved in the conduct of the ſame Prince, in his meſſages to the Perſian Tyrant, exhorting him to ſpare the blood of his Subjects and relieve an humane Conqueror from the pain of deſtroying the faireſt countries of Aſia. (*a*)

Such among many, were the good effects of *Chriſtianity* upon the Laws of War during theſe times—Not that it is meant to be aſſerted, that it was the ſole cauſe of the humanity which is ſometimes diſcoverable in this dark period; ſince among the moſt pagan and ferocious nations, examples often appear of a magnanimity and compaſſion, which ſhine forth and dazzle us amid the ſurrounding gloom. Of this, the accounts of the North American Savages, preſents us with many inſtances; and of this alſo, we meet with ſtrong proofs among the ſavages whoſe hiſtory we are examining. The Laws of ſeveral of their ſtates, made expreſs proviſions to enforce the rights of hoſpitality, (*b*) and various hiſtories

(*z*) See Gibbon, and the Authorities he quotes, Chs. 31. 49.
(*a*) Id. Ch. 46.
(*b*) By a Law of the Burgundians, tit. 38. S. 1. whoever refuſed Bed or Fire to a Stranger, was puniſhed with a fine of three ſhillings

tories might be related to ſhew how thoſe rights were reſpected.

Eminent among the reſt is the ſtory of ALBOIN. There had been old war between the *Gepidæ* and the *Lombards*, and ALBOIN, Prince of the latter, after overthrowing the Gepidæ in battle, pierced with his own hand the Son of TURISUND their king.

It was a cuſtom it ſeems among the Lombards, to reward valour with a ſeat at the royal table; but the ſon of the King could not ſit even with his father, until he had been inveſted with arms by ſome foreign Prince.—ALBOIN ambitious of this honour, did not heſitate with forty Companions, to viſit the court of TURISUND, and was thus in the power of a hoſtile and injured Nation. The generous Monarch however, though he could not prevent his grief from burſting forth at the ſight of him who had juſt ſlain his ſon; reſpected the rights of a ſtranger, protected him from the vengeance of his nation, and ſent him home inveſted with the bloody arms of his child. (*c*)

But though the virtues of hoſpitality found eminent place in the conduct of many Individuals; yet ſtranger Nations in theſe times had little reaſon to be happy under the Inſtitutions which governed their intercourſe. The eſtabliſhment of the FEUDAL SYSTEM, introduced all the vigour and harſhneſs of

ſhillings. By another among the Capitularies, ſome centuries afterwards, any one who ſhut his houſe againſt another going a journey, was fined ſixty ſhillings. L. 6. S. 82. and among the Slavi it was even a maxim. "Quo nocte ſuratus fueris, Cras apponе hoſpitibus. See Note F. F. Robert, Ch. 5. Introd. A Law of the Wiſigoths enjoins not only the good treatment of Merchants and Strangers, but that they ſhall be tried by their own Laws.

Fuero Juſgo. L. 2. P. 436.

(*c*) Gibb. Ch. 45. The Paradiſe of Odin was enjoyed even upon Earth by this fierce Prince, who, having ſlain the only ſurviving ſon of Turiſund, faſhioned his ſkull into a Cup, which ſerved him long after at his feaſts. Ib.

military

military watchfulneſs; and men in the boſom of their own Society, ſeemed to keep guard as if in a camp. If a perſon therefore removed from one ſtate to another, though it was in ſearch of ſettlement, the ſuperior Lord might ſeize him as his Slave. The cruel rights of the Inhabitants of the Sea Coaſts againſt thoſe who ſuffered ſhipwreck are well known; and among the Welſh, a madman, a leper, and a *ſtranger*, might be killed with impunity. (*d*)

If a man even of the ſame ſtate, paſt from one province of it to another. he was bound within a year and a day to acknowledge himſelf to the Vaſſal of the Lord of the manor where he ſettled (*e*): The Jus Albinatus, is hardly yet even worn out on the continent, and beſpeaks forcibly the inhumanity of the early Law of Nations.

Such then was the ſituation of Europe from the fall of the Roman Empire, till about the opening of the eleventh century; and we ſhall probably not be able to diſcover a period of its hiſtory, in which there is to be found, greater licence, leſs order, and conſequently leſs happineſs. In ſuch a ſituation therefore we cannot expect that any very clear ideas of

(*d*) Leges Hoel Dad. quoted by the Author of Obſervations on the Statutes, chiefly the more Antient, p. 22.

(*e*) So jealous indeed were our anceſtors of encouraging an entercourſe with Strangers, that by a law of the Conqueror, no man was allowed to receive a perſon unknown to him into his houſe for more than three days, unleſs he had been previouſly recommended to him.

Leg. Guil. Conq. apud Wilk. 227.

This was but ſimilar to the ſpirit of the Saxon Laws of H. Lotharius, Eadricus, and Edward, which enjoined that the hoſt ſhould be anſwerable for the delinquency of the ſtranger, in caſe he entertained him in his own houſe and nouriſhed him with his own food for three nights together.

Wilkins, Leg. Sax. 9. 203. De Hoſpitibus.

So alſo L. L. Withrœdi; Si peregrinus vel advena devius vagetur, et tunc nec vociferaverit, nec cornu inſonuerit, pro fure comprobandus eſt, vel occidendus, vel redimendus. Id 12.

the

the rights of mankind, either as Individuals or as Nations, were entertained. Sovereigns found difficulty in conceiving, and more in enforcing a Set of Laws, which ſhould be able to give peace to the interiour of their own ſtates; and it was not till after the eleventh century, or rather till after the diſcovery of the Pandects of JUSTINIAN, that the municipal Laws of the kingdoms of Europe came to aſſume any great regularity of ſhape. We may ſuppoſe then how little probable it was, that there could be any thing like a Code under the title of the Law of Nations. To ſuch a Law indeed men never ſeem to have appealed; CHRISTIANITY, it is true, obſcured as it was, by the interpretation which the Popes choſe to give of it, ſometimes interfered with effect; but with reſpect to maxims of juſtice, or a common ſet of Laws for the government of *States*; they ſeem not merely to have been ſhapeleſs, but abſolutely unknown.

An enquiry might here very naturally be made into the nature of the TREATIES which were entered into during this period; ALLIANCES and poſitive CONVENTIONS, often ſupplying the place of general maxims of juſtice, and forcing men to the obſervance of an equity which the rudeneſs of their manners prevents them from perceiving by nature. It is thus, as we before hinted, (*f*) that Barbarous and Infidel Nations have been inſenſibly produced into more poliſhed Claſſes, and led to the cultivation of more humane Laws. But the World was ſo particularly ſituated, and the darkneſs ſo univerſal during theſe times; that while the barbarous nations were allowed abſolutely to wanton in every indulgence to which the poſſeſſion of the moſt ſavage liberty could prompt them; there was no people within their ſphere, to

(*f*) Chap. V. ad fin.

ſet

ſet before them a better example, or incorporate them by TREATIES, with a better order of ſociety.

In common Wars, where the conquered people are allowed ſome indulgence, and reſpect is paid to their manners and arts; if they excel their conquerors in thoſe points, (which has often been the caſe,) they have ſometimes been the means of poliſhing even thoſe who enſlave them, the ſtubborn ſuperiority of the latter condeſcending to adopt their learning or refinements; and thus it was between Greece and Rome. (g) But the deſtruction of the *Roman* World, was ſo ſudden, and ſo total; and the object, as we have obſerved, was ſo evidently Extermination; that the Barbarians preſerved the manners of the deſert, amidſt the moſt ſplendid materials, for civilization, for ſcience, and for elegance. When theſe materials were deſtroyed, as they ſoon were, no other opportunities for recalling them preſented themſelves from foreign quarters. The Weſt was unknown: the South was ſcarcely believed to be inhabited beyond certain latitudes; and it was from the Eaſt and from the North, that the deluge came. If any nation could have improved them at all by treaty and alliance, at this time, it ſeems to have been the CHINESE; the doctrines of CONFUCIUS having been cheriſhed among them long before CHRIST. But that extraordinary Empire was removed to a diſtance far too great from the ſphere of their intercourſe, to be of the ſmalleſt ſervice to them; and poſſibly, if it could have heard of what was then paſſing in Europe, it might have conſidered it as our preſent nations conſider the revolutions of Wydah, or the Caffres.

EUROPE was therefore left abſolutely to itſelf for improvement; and under ſuch circumſtances, we

(g) The Hiſtory of the Tartars and Chineſe preſents us alſo with an eminent example of this.

cannot

cannot be ſurpriſed that its progreſs was ſlow. During the middle ages there is conſequently a great dearth of diplomatic knowledge; and the Treaties of thoſe times, afford us abſolutely nothing to obſerve upon, as far at leaſt as they relate to the Law of Nations.—What they do preſent, however, mark them as nations actuated by one common ſpirit; and though they are almoſt all *eccleſiaſtical*, and relate chiefly to the foundation of Convents; the building of Churches; and the grant of immunities to the Prieſthood; (*h*) yet that alone diſtinguiſhes them from the reſt of the World, under the forms of a characteriſtic RELIGION. (*i*)

(*h*) Vide the Corps diplomatic univerſel par Dumont—the Cordex Diplomaticus of Leibnitz—the anonymous Recuil des Traités, & Mabilion de re diplomatica—paſſim during theſe ages.

(*i*) The forms alſo in which theſe Treaties run, prove this very ſtrongly.

The name of Chriſt, and of the Holy Trinity, was invoked with great Solemnity; and this form, which continues to this day among Chriſtian Nations, began at leaſt as early as the time of Charlemagne.

See Du Mont. 1. 1. to 6.

CHAP.

CHAP. IX.

THE HISTORY OF THE LAW OF NATIONS IN EUROPE, FROM THE ELEVENTH TO THE FIFTEENTH CENTURY.

IN the laſt chapter we obſerved that barbarity and diſorder continued to overwhelm Europe till towards the opening of the eleventh century: we muſt not however ſuppoſe that the ferocity of manners and irregularity of principle, which have been recorded, periſhed all at once after that period. Changes in theſe points are for the moſt part effected by the ſlow lapſe of time; for while the whole external face of a country may be altered in a few months by labour and induſtry; ſuch is the fixed nature of habit and character, that it requires a long courſe of years to make them unbend, and many a generation wholly to deſtroy them. The picture therefore which we had of the cuſtoms of nations, in the preceding chapter, continues the ſame in its out-lines and greater features, long after the commencement of the period before us; and though by degrees its tints grow fainter and fainter, till at laſt they are loſt in one far more agreeable; they are ſtill to be traced in full ſtrength through a long line of years, and ſeveral centuries paſs away before they are entirely expunged. Previous therefore to the ample conſideration which we mean to give of the particular circumſtances which bore upon, and contributed to alter the law, it will be more perſpicuous if we purſue, in this place once for all, the account of ſuch events as juſtify theſe obſervations.

It is one of the moſt painful taſks of hiſtory to be obliged to record the facts which diſgrace, as well as thoſe which ennoble mankind, and in examining the cuſtoms which prevailed during this period, our humanity will be but too often ſhocked. Though frequently more regular, they were ſometimes not leſs barbarous than they were during the ages of which we have juſt been treating. They muſt however be related, as without them, the account of the times, though it might gain in ſoftneſs, would loſe in accuracy and truth, the moſt eſſential points of an hiſtorical enquiry.

Of all the nations which at this time pretended to the little civilization that was known, the Normans ſeem to have taken the lead in the diſplay of cruelty and inſolence, as well as of valour. In England they are deſcribed by the Moncks, as Devils rather than as men, and from their delighting in blood more than other nations, were ſuppoſed to be let looſe by the Almighty as the miniſters of his vengeance. (*a*) If the facts recorded of them are true, they ſeem indeed to juſtify the concluſion. They are ſaid to have put their priſoners to the moſt unheard of tortures, in order to diſcover treaſures that were ſuppoſed to be concealed; they ſuſpended men over fires by the head, the feet, and the thumbs; they cruſhed their brains with tight ligatures, and threw them into dungeons ſwarming with ſerpents. (*b*) When they turned their eyes on the ſofter ſex, left deſtitute of protection by the ſlaughter of their kindred, no law or ſentiment of generoſity could defend them from their brutality; the Cloiſter alone afforded them ſecurity for their chaſtity; a proof that the conquerors proceeded on a ſort of ſyſtem, and that their violence was the effect of received cuſtoms which knew what was to be reſpected, not

(*a*) H. Huntingdon, p. 212. (*b*) Chron. Sax. p. 238.

of

of the mere heat of battle which reſpects nothing. There is a remarkable confirmation of this in the caſe of MATILDA of Scotland, who, though a foreign and *neutral* Princeſs, at that time in England for her education, was obliged to aſſume the veil under William the Firſt, and was married afterwards to his youngeſt ſon. The marriage of a Nun being unlawful, and the clergy examining her upon the point, ſhe aſſigned the defence of her chaſtity as the ſole motive for her profeſſion: The plea was allowed to be a good one from the *known and acknowledged* cuſtoms of the Normans, and was adopted by many others in the ſame ſituation and with the ſame ſucceſs. (*c*) Such was the conduct of a people who ſtigmatized their victims with the name of barbarians, (*d*) an appellation in which, added to the rights they aſſumed upon it, they ſeem to have imitated the inſolent ferocity of the Grecian law of nations, mentioned in a former chapter. (*e*)

The barbarity of the *Scotch* cuſtoms of war appears equal to the *Norman*, and the general ravage of a Scottiſh invaſion, more particularly that of DAVID the Firſt, may be compared to the Scythian cruelties; the ſick and aged were murdered in their beds, infants at the breaſt, and prieſts at the altar. David however was famed for humanity, and the only excuſe for him is, that the received cuſtoms of the troops he commanded, made it uſeleſs for him to forbid what he could not prevent. (*f*)

In *Italy*, which claims to have been the firſt to emerge from the barbariſm which deſolated Europe, cruelties not leſs ſhocking were often exerciſed. At the cloſe of the twelfth century, MARCUALDUS, Seneſchal of the Empire, and pretender to the regency of Sicily, invaded that Iſland: He was ſo far

(*c*) Eadmar. Hiſt. L. 3.
(*d*) William of Poictou. p. 202.
(*e*) See chapter vi.
(*f*) Lyttelt. Hen. 11. 1. 183.

regular as to wait the denial of his demand, before he declared war. When it commenced however, he burſt like a ſtorm upon the unfortunate people; he buried moſt of his priſoners alive; he burned the Eccleſiaſtics; and thoſe whom he treated with the greateſt lenity he threw them into the ſea. (*g*) In 1264, MAINFROY, the natural ſon of Frederick II. making war upon the pope in Tuſcany, puniſhed the prelates who fell into his hands by mutilation and death. (*h*) On the other ſide his rival and conqueror CHARLES of Anjou reſerved numbers of the priſoners whom he took at the battle of *Beneventum* for his entry into *Naples*, where they were put to death like common criminals; (*i*) in revenge for which, and other cruelties, twenty years afterwards, two hundred gentlemen taken by the Sicilians in a naval battle, were beheaded in cool blood by the famous admiral LORIA. (*k*)

A milder puniſhment on that occaſion was experienced by the common ſoldiers, who were ſent to the gallies, and who as a mark of infamy were firſt condemned to have their hair cut off. (*l*) It is remarkable that the loſs of hair ſhould have continued thus long in Europe to be a ſign of diſgrace. Under the *Merovignian* race of kings in France, it was the ſame as the loſs of the crown; and amid the frequent revolutions which that family underwent, every dethroned prince was regularly ſhaven and thrown into a convent, after which it was ſuppoſed that he could not pretend to public affairs. The pride of long hair was extremely antient among the northern nations, and is to be traced far back among the Scan-

(*g*) Ep. 157. ap geſt. Innocent III.
(*h*) Burigny Hiſt. de Sicil. 2. 145.
(*i*) Id. 21. 160. (*k*) Id. 2. 208.
(*l*) Burigny Hiſt. de Sicil. 2. 207.

dinavians.

dinavians. (*m*) To endeavour to account for it, any more than many other human prejudices, would probably be vain; it is ſufficient to have remarked the fact.

Perhaps indeed it may be denied that theſe and a number of other examples were in conformity with the received laws of war, and they may be ſuppoſed rather to have ariſen from the accidental burſts of violence in particular men. Their univerſality however, and, what is worſe, their duration all over Europe, prove them to have been the conſequence of ſettled cuſtoms; and the cuſtom of nations, as has often been obſerved in the courſe of this work, is the only law which can govern them, when particular conventions have not been agreed upon. Numbers of the caſes of barbarity which preſent themſelves, are beſides ſo regular and uniform in the circumſtances of their ſeverity, that they muſt have been founded on general maxims. There was a fixed object propoſed in them, and they were the means adopted to obtain it.

Among theſe might be reckoned the barbarous military puniſhment of *mutilation*; inſtances of which are perpetual throughout the hiſtories of Europe. They are matters of horror, but they muſt be related, and we may then judge whether they can be deemed mere acts of diſorder.

In the tenth century, THEOBALD duke of Spoletto, who is deſcribed by the hiſtorian as not undeſerving the title of hero, having condemned his captives to the moſt odious of all mutilations, granted them

(*m*) See the ſtory of the young men of *Jmſburg*, put to death by Trochill. The ſeventh of them, ſays the record, had long fair hair, as fine as ſilk, which floated in curls and ringlets on his ſhoulders,—being aſked what he thought of death, I receive it willingly replied he; I only beg of you one favour, not to let my hair be touched by any one of a lower degree than yourſelf, not be ſtained with my blood.—Maliet's North. Antiq. 1. 205

mercy at the prayers of a woman. Being aſked however what puniſhment her huſband deſerved ſhould he be again taken in arms, her anſwer marks the ſpirit of the times. "He has eyes and a noſe, ſaid ſhe, hands and feet, theſe are his own, and theſe he may deſerve to forfeit by his perſonal offences." (*n*) The maxim continued long afterwards in Europe. Not to go into our own ſtory beyond the time of William the Conqueror, whoſe ſeverities this way are well known; his ſon RUFUS took vengeance upon the Welſh in the year 1098 by cutting off their feet and hands: (*o*) In 1107 Robert duke of Normandy loſt his eyes for endeavouring to break priſon to which the laws of war had condemned him. (*p*) In 1136 Magnus king of Norway was emaſculated by Eric of Denmark; (*q*) and in 1190 the Suabian Emperor Barbaroſſa, delivered his captives of Milan to the knife of the executioner, or ſhot them from military engines. In the next century Marcualdus puniſhed the Sicilian nobles with different mutilations; and ſixty years afterwards Mainfroy, as has been obſerved, made war on the clergy in the ſame manner.

The barbarous treatment of Roger II. by the Emperor Henry VI. may be attributed to motives of policy, rather than the received cuſtoms of war; nevertheleſs we can have little idea of the regularity of thoſe times, when even with theſe motives, a king conquered by another in open war, was emaſculated, and delivered over to perpetual impriſonment, in order to cut off all hope of poſterity. (*r*)

At

(*n*) Luitprand Hiſt. L. 4. ch. 4. I have tranſcribed Gibbon's tranſlation. See the whole of that curious ſtory. Dec. & Fall. 10. 254.

(*o*) Cod. Leg. Vet. Spelm. ap. Wilk, p. 283.

(*p*) Mat. Par. 60.

(*q*) Mod. Un. Hiſt. 28. 461.

(*r*) Ut ſpem omnem ei ſucceſſionis Henricus adimerit, et de jure hæreditatis futuræ poſteris litigandi furriperet cauſam, genitales

At the ſiege of Liſbon in 1370, it was the cuſtom of the Spaniards ſays Froiſſart, when they took a priſoner, to tear out his eyes, and cut off his feet and hands, and in that condition to ſend him back with a meſſage to his countrymen, threatning them all with the ſame fate. (s) Laſtly it is ſaid to have been the reſolution of the French before the battle of Agincourt in 1415, to cut off the three fingers of the right hand of every Engliſh archer who ſhould fall into their power; a deſign of which Henry well knew how to take his advantage, in his ſpeech to the ſoldiers on that memorable day. (t)

Shocking as this mode of military vengeance appears, we probably are not to attribute it altogether to the ferocity of the times, and certainly not to the ſudden paſſion of individuals. In all probability it took its riſe from deliberate views of policy. In an age when war was the ſole buſineſs, and the power of doing active miſchief was therefore conſidered as the higheſt endowment, the value of the members of the body was heightened in proportion; and as the theory of puniſhment ſpeculates chiefly on thoſe things on which it beſt can take effect, the forfeiture of the limbs came thus to be a common penalty even under municipal laws. We cannot therefore wonder if under the law of nations, where ſo much muſt always be left to the diſcretion of the conqueror, the ſame ſpirit ſhould appear. Accordingly, it ſeems to have governed both the warrior and the legiſlator, and was found in the camp as well as in the hall of juſtice.

Another ſtrong mark of defalcation of proper principles, rather than of mere bloodineſs of diſpoſition, appears in the frequent uſe of poiſon, which

tales illi partes deſecans, Eunuchum fecit, et carceri ad mortem uſque addixit.—Fazellus. de. reb. Siculis. 435, 39.

(s) Froiſſart B. 3. ch. 28.

(t) Villaret Hiſt. de Fr. 3. 172.

we

we find during this period. If the death of enemies was the chief object in battle, it was of little conſequence it was ſuppoſed, how it ſhould be accompliſhed. Hence the uſe of poiſoned arms, and the ſtill more ſhocking expedient, ſometimes fallen upon, of poiſoning the wells of a country or town through which ſoldiers were to march, or which they beſieged, was at leaſt cuſtomary, if it was not abſolutely legitimate. The death of Cœur de Lion was owing ſolely to the poiſon of the arrow which wounded him; (*u*) and ſo far down as the year 1563 we find an inſtance of the ſame kind in France; Ambroſe Earl of Warwick having died of a wound which he received in the leg, at the defence of Newhaven, by a poiſoned bullet. (*v*) The latter horrid practice, (not to ſtop here at the ſuppoſed manner in which the Greeks got rid of the Cruſaders,) is to be found at leaſt as far down as the ſiege of Bourges in 1412, where the French are ſaid to have corrupted the fountains in the ſuburbs, the better to cut off the beſiegers. (*x*)

A priſoner in theſe early ages being ſuppoſed to be perpetually at the mercy of his conqueror, even long after the battle in which he was taken; it was not conſidered as unfair to look upon him as an hoſtage for what might be done by the enemy, or to threaten and to exerciſe ſeverity againſt him, in order to extort what otherwiſe perhaps might not have been eaſily obtained.

Upon this principle it was, that HENRY the Fifth proceeded in ſeveral of his ſieges in France. At *Rouen* in 1418 gibbets were erected all round the city, and as a mark of what the inhabitants might expect if they perſiſted to defend themſelves, the

(*u*) Mat. Par. 195.
(*v*) Birch. Mem. of Q. Eliz. 1. 6.
(*x*) Monſtrelet. Chron. de Fr. ſub. an. 1412.

priſoners

priſoners were hung up upon them in ſight of their friends. The ſame conduct was purſued at *Monteran* in 1420.—Yet Henry after the capture of *Rouen*, had ſtipulated that a large body of citizens who had been expelled the city in order to ſave proviſions, ſhould be reſtored and fed for a twelvemonth at the expence of the inhabitants; (*y*) and from this and other inſtances, (particularly that famous proof of his knowledge of what good order required of him which has immortalized his youth,) it ſhould ſeem that it was not ſo much his own barbarity, as the cuſtom of the times which led him into theſe cruelties.

Upon this principle alſo it was, that *Beatrice* ſiſter of *Conſtance* queen of Arragon, was delivered from a long captivity in which ſhe had been held by Charles of Anjou the conqueror of Naples. The Arragonians having defeated and taken in a naval battle the prince of Salerno, the queen diſpatched a veſſel with him into the port of Naples, where the captain calling forth the princeſs his conſort, pointed out her unfortunate huſband on the deck, an executioner at his ſide and menaced him with inſtant death if Beatrice was not given up. This was done upon the ſpot, (*z*) and he himſelf was afterwards detained to be once more the inſtrument of the ſame kind of policy. His father meditating the ſiege of Meſſina which was the place of his captivity, the Meſſenians threatened again to put him to death if the king ſhould dare to ſet foot in Sicily. (*a*)

The hiſtory of this houſe of Anjou is fertile in events of conſequence to the law of nations.—Far before the reſt is the caſe of the unhappy CONRAD-

(*y*) Monſtrelet. Chron. de Fr. v. 1. ch. 201, 225.

(*z*) Burigny, Hiſt. Sicile 2. 208.

(*a*) Burigny Hiſt. de Sicile 2. 208. It was a policy of the ſame kind which was ſuppoſed to have ſaved Paris from the duke of Brunſwick in 1792, when the unfortunate Louis XVI. was detained priſoner by his ſubjects.

DIN. This unfortunate young prince, if lineal ſucceſſion could have been allowed to take its courſe againſt the infallible will of the ſovereign of Rome, was the undoubted heir to the crown of Sicily. (*b*) But that mighty power having through hatred to his family beſtowed the kingdom, whenever he ſhould conquer it, upon the Count of Provence, and the battle of Beneventum having decided it in his favour, the Count ſucceeded quietly to the enjoyment of his conqueſt. After a few years however, the young Conraddin with a ſpirit of adventure far beyond his age, ſeconded by his friend and couſin Frederic of Auſtria, as young as himſelf, prepared to aſſert the rights of his houſe. They were both of them met, defeated and taken by the inexorable Charles, whoſe treatment of them on this occaſion forms a caſe in the law before us, about which there has often ſince, been much difference of opinion. Unwilling to incur the character of a tyrant who could himſelf bear all the guilt of blood and murder, he reſolved to adopt a conduct infinitely more prejudicial to the rights of mankind; ſince men may guard againſt what all allow to be forbidden, but can never eſcape the murder which is ſanctioned by law. Aſſembling therefore the judges, he brought his priſoners before them, and after having heard with care (to uſe the expreſſion of the hiſtorian,) "*all the reaſons that* "*could be drawn from law, and the jus publicum,*" they were found guilty of *treaſon*, and condemned to ſuffer death on the ſcaffold. (*c*) They were ac-

(*b*) He was the grandſon of the famous Frederic II. Emperor of Germany and king of Sicily, whoſe quarrels with the Pope are ſo celebrated in hiſtory.

(*c*) An antient French hiſtorian gives the following account of it. "Illuec ſit aſſambler pluſeurs Seigneurs de loys, et autres "ſages hommes, & jugierent que *par* droit il devoit avoir les "chiées coupés, comme cil qui eſtoient coupable de la malveſtie "et deſloyeauté eſgenée."—Guilliaume de Nangis. Ann. de St. Louis. 267. See alſo Velly Hiſt. de Fr. & Giannone. 19. 2.

cordingly

cordingly led into the market place, and after having been reproached with their crimes, and forced with a refinement of cruelty to aſſiſt in the chapel at their own funeral ſervice, they patiently ſubmitted to the axe of the executioner.

When we conſider in this remarkable caſe, that neither CONRADDIN nor his couſin FREDERIC were at all dependent upon Charles; that allowing him to have been the lawful king, they owed him no allegiance, that they came in arms as open enemies, and made war upon him according to the forms of war; we ſhall find difficulty in diſcovering by what maxim of juſtice they could be condemned. Carrying the rights of war to their utmoſt extent, Charles after the battle might have kept them in perpetual impriſonment, or with ſtrong hand might have ſwept them from the world, as enemies with whom he never could be ſafe. That he could condemn them according to the forms of a judicial proceſs, can only be attributed to the peculiar irregularity of the age. At the ſame time it deſerves to be marked as a fact well worthy of notice, that while every thing ſeemed to bend before the fortune of the houſe of Anjou, a man was found adventurous enough to queſtion the validity of the ſentence, and to write a book to prove that it was contrary to the law of nations. This was *Succaria*, a civilian of thoſe days, (*d*) and his book, whether well or ill executed, preſents us I believe with the firſt inſtance of the law of nations conſidered of importance enough to be treated as a ſcience. The caſe however continued on the records of the world, and ſtreſs was laid upon it three hundred years afterwards, by thoſe who condemned the unfortunate queen of Scots. (*e*)

More than a century after this, (1384) the ſame family furniſhes us with another example of the

(*d*) Burigny Hiſt. de Sicile, 2. 174.
(*e*) Camden's Eliz. p. 376.

ſame

ſame ſort of violence. *Jane*, the deſcendant of Charles, having adopted the duke of Anjou, brother to Charles the Sixth of France as her heir; the duke of Durazzo, who was next in ſucceſſion, made war upon her, and became maſter of her perſon. As her own right to the throne, had never been doubted, there was not a pretext to put her to death; but *Jane* in the courſe of her reign, had been guilty of infidelity and murder, and the law of nations of thoſe times, which permitted every irregularity, ſeemed even to command, what certainly was but retribution. However ſacred therefore the inviolability of crowned heads may be conſidered by more regular maxims; the maxims then in exiſtence called loudly for her puniſhment, and ſhe was ſtrangled in conſequence, by order of her conqueror, as ſhe herſelf had ſtrangled her firſt huſband Andrew of Hungary ſome years before. (*f*)

The deliberate execution of officers after having behaved gallantly at their poſts though forced to ſubmit to ſuperior power, is ſtill leſs to be defended. We obſerved inſtances of this in all the periods we have yet touched upon, and it continues during that immediately before us. The whole of the garriſon before which RICHARD the Firſt loſt his life were immediately put to death by that prince, except the ſoldier by whoſe arrow he fell. But though pardoned by the king, in whom the ſeeds of true magnanimity ſeem only to have been ſtifled by the barbarity of the times, he was but reſerved for a ſeverer vengeance; being unmercifully flayed alive by *Markadæus* ſecond in command. (*g*)

The well known fate of the brave Sir William Wallace in 1305 is a diſgrace indelible to the Engliſh name and the character of the age.

(*f*) Paſquier recher. de la Fr. 6. 26.—Giannone 23. 5.
(*g*) Hovedon. p. 791.

In

In 1414 Beurnonville commander of Soiſſons for the duke of Burgundy, being forced to yield the town after a vigorous defence, was taken deliberately to Paris, and led to execution like a criminal, in revenge for the death of Hector de Bourbon, killed during the ſiege. (*h*) I paſs over the condemnation of the famous Joan d'Arc, ſince (however it may ſully the reputation of the duke of Bedford for not ſaving her life,) the avowed motive for her death, was her being an enchantreſs and an heretic, and therefore it cannot in any ſort be brought under the cuſtoms of war. (*i*) Too many examples however may be adduced in ſupport of the point in queſtion, and it is remarkable that they occur moſt frequently in the very century from which a celebrated hiſtorian looks back upon the progreſs of mankind from the barbarous ages, and pronounces it to be immenſe; they occur alſo under characters which we are accuſtomed to regard with favour and reſpect.

At the ſiege of *Rouen*, mentioned before, HENRY the Fifth reſerved by an expreſs article of the capitulation, a certain number of men on whom he ſhould be allowed to exerciſe his rights of vengeance.

In 1421 at the ſiege of *Meaux*, Vaurus the Governor, in order to inſpire an irreconcileable hatred into his ſoldiers againſt the Engliſh, ſent his priſoners regularly to an Elm, (which on this account was called the Elm of Vaurus,) where they were hanged without mercy. "Let them be carried to my Elm," were the words of the inexorable ſentence. The Engliſh of courſe retaliated, and with comparative mildneſs, contented themſelves on the fall of the place, with putting to death ſix of the principal officers, at the head of whom was Vaurus himſelf. (*k*)

(*h*) Monſtrelet ad an. 1414. v. 1. ch. 121. His head was ſtuck on a lance, and his body hung up by the armpits.

(*i*) See a long and able but partial account of her proceſs in Villaret, 3. 432. et infr. & v. 4. ad init.

(*k*) Chron. de Monſtrel. ad an. 1421.

In

In 1431 the Commandant of Guerron, a garriſon in Champagne, being preſſed to extremity by Luxemburg, a French general, could only ſave the majority of his ſoldiers by yielding up every fourth and ſixth man to the mercy of the conqueror.

The garriſon paſſed in view before Luxemburg, the victims were choſen, and executed on the ſpot by one of their own body, who was forced to ſerve this bloody office. (*l*)

In 1476 I find a ſtrange law of war which in theſe days would be held equally infamous. The duke of Burgundy having beſieged Nanci; efforts were made by ſeveral gentlemen to throw themſelves into the place. One of them being taken in the attempt, the duke ordered him to be immediately hanged, *ſaying that it was contrary to all the rights of war, when a general had begun the ſiege of a town, and the fire of the artillery had commenced, for any one to attempt to enter the fortreſs in order to defend it.* Commines who gives the account adds that this was really the cuſtom in Spain and in Italy. (*m*) In 1479, Maximilian archduke of Auſtria, being arreſted three days in his progreſs by Raimonet commander of the little caſtle of Malauny near Terouenne, that governor was inſtantly hanged on the ſurrender of the caſtle. (*n*) Near three hundred years from the time of *Richard* I. when ſuch enormities were moſt frequent, had thus produced no amendment. The latter days of Maximilian come within the period to which the maxims and politics of later times are uſually traced; but all through the century in which his name ſo often appears, the cuſtoms of war are peculiarly ſhocking.

The cruel and mutual ravages of the French and Engliſh are ſaid to have been ſuch, that neither man nor woman was to be ſeen in the whole country of

(*l*) Monſtrelet ſub. an. 1431. (*m*) Commines, L. 5. ch. 6.
(*n*) Contin. of Monſtrel. p. 71.

Caux,

Caux, except the garriſons of fortified places. (o) Nor can there probably be a more feeling deſcription of the miſeries of war in theſe barbarous times than the following tranſlation of Speed from Polydore Virgil. "While the Engliſh and French (quoth he) "contend for Dominion, Soveraignty, and life itſelfe, "mens goods in France were violently taken by the "licence of warre, Churches ſpoiled, men every "where murthered, or wounded, others put to "death, or tortured; Matrons raviſhed, Maydes "forcibly drawne from out their parents armes to bee "deflowered, Townes daily taken, daily ſpoiled, "daily defaced, the riches of the inhabitants car-"ried whither the Conquerours thinke good; houſes "and villages round about ſet on fire: no kind of "cruelty is left unpractiſed upon the miſerable French. "Neither was England her-ſelf void of theſe miſ-"chiefes, who every day heard the newes of her "valiant Childrens funerals, ſlaine in perpetual ſkir-"miſhes and bickerings, her generall wealth conti-"nually ebd, and wained, ſo that the evils ſeemed "almoſt equall, and the whole Weſterne world "echoed the groanes and ſighes of either Nations "quarrels, being the common argument of ſpeech "and compaſſion throughout Chriſtendom." (p)

Savage however as this picture has repreſented the Engliſh in their mode of making war, we have authority for believing that they exceeded all other nations in the regularity of their proceedings, at leaſt according to the ideas of the age. The devaſtations that have been deſcribed were therefore common all over Europe, and miſerable indeed muſt have been the lot of the world. (q) We cannot then agree with

(o) Chroniques de France. 124. (p) Speed. p. 668.

(q) Philip de Commines who lived long in the century during which moſt of the inhuman practices that have been mentioned took place, has this remarkable paſſage. "Or ſelon mon advis, "entre

with the remark of Dr. Robertſon, (as far at leaſt as it may be ſuppoſed to concern the law of nations,) that the progreſs which mankind had made towards order and refinement, from the fall of the Roman Empire to the opening of the fifteenth century, muſt appear immenſe. (*r*) Much no doubt had been done, towards the melioration of municipal eſtabliſhments, much in ſome of the ſciences, and in many of the arts: but of the law of nations, as founded on the principles of humanity and juſtice, men ſcarcely ſeemed to have thought.

While ſuch poor reſpect was thus paid to the lives of perſons who according to every ſentiment of generoſity, if not according to the principles of ſtrict right, were entitled to them, we cannot be greatly ſurpriſed that even during times of peace, little regard was ſhewn to their liberty.

The power of moving at pleaſure over the earth, is one of the natural rights of mankind; and though this right has been curtailed in conſequence of the inſtitution of property and dominion, ſo that men have no longer the liberty of entering at will into one anothers territories; yet whenever this is done, the utmoſt that ought to enſue is immediate expulſion. The right to detain them priſoners can never be juſtified, and is ſtrenuouſly denied by all chriſtian civilians. Nevertheleſs, we ſaw it univerſally exerciſed under the Greek and Roman law of nations, (*s*) and notwithſtanding the efforts of the Chriſtian Church, the practice was by no means worn out during the period before us. A great number of examples might be adduced to prove this. I ſhall confine myſelf to thoſe few which were of the greateſt conſequence to

" entre toutes les Seigneuries dum monde dont J'ay connoiſſance,
" où la choſe publique eſt mieux traitée, et où il y'a nuls edifices
" abbatus, ny demolir pour guerre, c'eſt Angleterre; et tombe le
" ſort et le malheur ſur ceux qui ſont la guerre." L. 5. ch. 19.

(*r*) CHARLES V. Introd. S. 2. (*s*) See chap. vi.

others;

others; and which from the ſacredneſs of character in thoſe concerned, made every attack upon their inviolability appear the ſtronger.

Poſſibly the celebrated Norman invaſion, and if ſo, the whole tenor of our laws, and by far the moſt important tranſactions of the earlier part of our hiſtory, may in ſome meaſure be attributed to the exiſtence of this unjuſt cuſtom. In the year 1062, HAROLD duke of Weſſex, an aſpirer to the crown of England, was driven by a ſtorm into one of the ports of the earl of Ponthieu on the coaſt of *Normandy*. There was no war at that time between the countries, but the Earl immediately ſeized him, in order, according to the cuſtom of the age, to make advantage of his ranſom. The priſoner however was demanded by the duke of Normandy his ſuperior lord, not, as it might be thought, to ſet him at liberty without recompenſe, but before he gave it, to exact from him an oath that he would not oppoſe him in his own deſigns upon the throne. HAROLD declared the oath void on the plea of "*Dureſs*," and purſuing his fortune obtained the crown. The flimſy title of William received no ſmall ſupport in the eyes of men from this ſuppoſed perjury of the duke of Weſſex, with which he did not fail perpetually to reproach him. (*t*)

A more celebrated example of this ſort of injuſtice, appears in the caſe of RICHARD the Firſt.

It is well known that that prince on his return from the Holy Land, was ſhipwrecked in the Adriatic, and endeavouring to paſs through the territories of the duke of Auſtria, was arreſted, thrown into priſon, and afterwards ſold to the emperor Henry the Sixth. Although this as might be expected, raiſed much indignation among his ſubjects, and actually

(*t*) See Will. of Malmſb. L. 2. p. 52. L. 3. p. 56. Mat. Pa. p. 1.

called down the thunders of the Pope, to whom he appealed, againſt the authors of his misfortune; yet no mention ſeems to have been made of the tranſaction, as a breach of the cuſtom of Nations. The one ſeems to have ariſen from affection; the other from the reputation he had acquired in the ſervice of CHRISTIANITY, and the well known law that no one who had aſſumed the croſs ſhould be interrupted by any act of hoſtility from enemies at home. Neither the repreſentations of the See of Rome to Henry and Leopold, nor his own complaints, which reſounded throughout *Europe*, make the leaſt mention of it, as a violation of public law: on the contrary the affair in the meaſures that were taken upon it, ſeems to have been nothing extraordinary. Henry writes an oſtentatious account of the arreſt to Philip of France as a fortunate event which would pleaſe him, and claims merit from the tranſaction. (*u*) The immenſe ranſom of 100,000 marks was demanded, ſeveral ſevere articles were preſcribed, and ſixty-ſeven hoſtages agreed upon for their performance, (*x*) as if he had been taken priſoner in open battle. The ranſom was regularly raiſed according to the feudal proviſions for ſuch caſes, and his mother Queen ELEANOR took a voyage to Germany for the ſettlement of the affair. Before it was completed however, there were many negociations with the King of France who wiſhed to purchaſe this illuſtrious captive, and it was owing chiefly to the veneration which the princes of Germany had conceived for him, that the ſale did not actually take place. (*y*) The ſale of priſoners, it is to be obſerved, *as a matter of property*, was perfectly within the rules of nations

(*u*) Hoveden. 410. Heming. cap. 63.
(*x*) Rym. Fœd. 1. 84.
(*y*) Rapin Thoyr. Sub an. 1194.

then

then in practice, as we ſhall preſently have occaſion to demonſtrate.

Two hundred years afterwards, we find a remarkable inſtance of the ſame kind. In 1406 ROBERT king of Scotland, dreading the violence of his brother the duke of Albany, reſolved to ſend his ſon and heir JAMES, for ſafety as well as for education, to France. The young prince ſailing along the coaſt of Norfolk in his paſſage, and being ſeized with illneſs, had the imprudence to venture on ſhore. He was immediately arreſted by the people on the coaſt and conducted to HENRY the Fourth, who ſenſible of the value of ſuch an inſtrument againſt a nation with whom there was almoſt perpetual war, detained him captive. There was however at that time no war between the countries, and James even came provided with a letter from his father to Henry, in caſe he ſhould be obliged to touch in his dominions. His captivity laſted eighteen years; during which, as the only palliation that can be offered, no care was wanting to complete his education. At the end of that time he was not releaſed but on the payment of a regular ranſom of forty thouſand marks, and ſwearing to preſerve a peace between the kingdoms. (*t*)

The next century ſaw the cuſtom ſtill in exiſtence, and it is England again which furniſhes the caſe.

In 1506 the archduke Philip, king of Caſtile in right of his wife, paſſing through the channel from the Low Countries to Spain, was forced by a tempeſt into Falmouth, where he landed, "weary and ſicke," ſays Speed, "with the violent toſſings of the ſea." The news of his arrival (to purſue the account) ſtirring up the men in authority thereabout, Sir Thomas Trenchard, with the ſudden forces of the country, not knowing what the matter might be, came thither, and underſtanding the quality of the ſtranger, ſent

(*t*) Rym. 10, 299, 300.

off poſt to Court for inſtructions. Sir John Carey alſo came down to the coaſt with a troop of armed men, and Philip fearing conſtraint, becauſe *they durſt not let him paſs without leave of the king*, was obliged to yield to his fortune. HENRY the Seventh, at that time upon the throne, knew the value of this opportunity too well to let it ſlip, nor would he ſuffer Philip to depart the kingdom. till he had extorted from him the Earl of Suffolk, his rival, to whom Philip had till then afforded an aſylum. (y) Such were the maxims and conduct of States during the times before us, in caſes where juſtice and the laws of hoſpitality, even as practiſed by ſavages, called loudly for the reverſe. (z)

While things during a ſtate of peace bore ſo much the appearance of war, it was not unnatural for the great men of thoſe times to view one another with a jealouſy that was perpetually on the watch; and the manner in which this jealouſy diſplayed itſelf will furniſh the next object of our conſiderations.

The mutual fears of private men are rendered uſeleſs, and are therefore diſſipated by the protection of the laws; but the fears of kings, who are the repreſentatives of whole ſtates, and who are therefore independent of all tribunals, can never be laid aſide, except through the influence of good morals; and where theſe are unknown, diſtruſt muſt be univerſal. Hence the precautions which States are conſtantly

(y) Speed. 761.

(z) The practice was not worn out even ſo low down as the laſt century; Cardinal de RICHELIEU, whoſe progreſs was ſeldom retarded by ſcruples, having arreſted the Elector Palatine, who had ventured into France upon the ſtrength of being at peace with that kingdom. The real motive for his impriſonment, which was a very cloſe one in the Bois de Vincennes, was his deſign to treat for the army of the deceaſed Duke of Saxe Weimar; the aſſigned reaſon, *the right which all nations had to arreſt ſtrangers who came into the country without a ſafe conduct.* See Bougeant' Hiſt. de la P. de Weſtph. L. 5. S. 60.

taking

taking one againſt another; and hence, during the ages in queſtion, the fear even of perſonal violence was indulged, and for the moſt part provided againſt, whenever Kings or Generals came into contact with one another. Of this there is a variety of inſtances, and none ſo remarkable as that exhibited perpetually by two Sovereigns who, from their weight and power, the one in temporal, the other in ſacred matters, were without conteſt regarded as the heads of Europe. The continued claſh of intereſts which divided the Popes and the Emperors, it is not our buſineſs to examine. It is well known, however, that the former boaſted themſelves the ſucceſſors of Saint Peter; the latter of the antient Cæſars; in virtue of which, they both equally claimed ſuperiority over each other. This, as might be expected, produced a laſting jealouſy; and as the ceremonial of Europe ordained that the Emperors ſhould receive their ſacred unction from the hands of the Popes, it was uſual, previous to the commencement of a ceremony where they were to approach ſo near to one another, for each of them to take an oath *that they would not be guilty of aſſaſſination during its performance.* This remarkable oath was duly adminiſtered to FREDERICK BARBAROSSA and ADRIAN IV. upon the coronation of the former at Rome, in 1155. (*a*)

Commines has ſet before us, with great livelineſs of colouring, the mutual diſtruſts of CHARLES the Bold, and LEWIS the Eleventh.

After the battle of *Mont l'heri*, a treaty was ſet on foot between thoſe two famous rivals, which was ſoon concluded at Conflans. While the negociation went on, there was a ſuſpenſion of arms, during which they had ſeveral conferences together, between Paris and the Burgundian camp; and one day the Count ſuffered himſelf to return with the King

(*a*) Voltaire. Eſp. des Nat. 2. 2.

within

within the very ramparts of the town. In modern times ſuch a procedure would not have been reckoned uncommon; it would have cauſed neither ſurpriſe nor fear; the Count, however, is related to have been quite aſtoniſhed (*tout eſbahi*) at his own raſhneſs, though he put the beſt face upon it; and when it was known at the camp, the whole army was filled with conſternation. The ſoldiers, who were amuſing themſelves in the fields without the intrenchments, were immediately called in, and the generals aſſembled together in council, where, after many murmurs at the raſhneſs of their leader, the Marechal de Bourgogne ſpoke as follows:—"If this young "madman *has thus gone to his ruin*, do not let us on "that account be the ruin of his family and ourſelves: let every man retire to his poſt, and be "prepared for the worſt; we are ſtill ſtrong enough, "if we keep together, to reach our own frontiers." Soon after this, the Count returned ſafe; and, upon ſeeing the Marechal de Bourgogne, cried out, "Do "not blame me, for I know my own madneſs." All the army, ſays the hiſtorian, praiſed the honour of the king for not ſeizing him while in his power; which, however, it was not again thought prudent to tempt. (*b*) It is needleſs to obſerve upon the cuſtoms of that time in which praiſe could be given to a man for not doing what, according to our preſent ideas of juſtice, would have drawn upon him the univerſal execration of Europe.

When the ſame Monarch was invaded by EDWARD the Fourth of England, he wiſhed to avoid extremities by negociation; and for that purpoſe demanded a conference with the King at *Picquigny*. The diſtruſt of the times made it impoſſible for theſe two crowned heads to meet without precautions, which would diſgrace a modern tranſaction of the ſame

(*b*) Commines, L. 1. Ch. 13.

kind.

kind. Upon a bridge over the Somme was erected a barrier of ſtrong trellis-work, ſuch as forms the cages of lions, the bars extending no farther aſunder than to admit a man's arm with eaſe. Four gentlemen of the king of England's party were admitted on the French ſide, to ſee, ſays Commines, what was doing among them; and as many from their party, and for the ſame purpoſe, on the ſide of the Engliſh. In this manner it was that the heads of the greateſt nations in Europe were obliged to meet (*c*) in the courſe of a tranſaction which of all others demanded confidence, and friendſhip, namely, the ſettlement of peace.

This mode of meeting on different ſides of a barrier, was at that time common; Lewis had taken the ſame precaution before, in his interview with his own conſtable St. Paul, upon the bridge of Noyon; (*d*) and the Dauphin his uncle had ſet him the example at his meeting with the Duke of Burgundy on the bridge of Monterau Faut yonne, where indeed the latter loſt his life.

While ſuch was the conduct of crowned heads and men of power towards one another, it was almoſt a neceſſary conſequence that theſe who were only their repreſentatives ſhould experience a treatment, and live under cuſtoms, at leaſt as irregular. The facts relating to the conduct towards Ambaſſadors and Heralds, during theſe times, evince it but too fully. Edward the Black Prince, who was the flower of chivalry, and whoſe courteſy in war will be renowned as long as our language ſhall exiſt, was himſelf, according to our preſent maxims, not without fault in this reſpect; and his conduct towards Charles V. of France, together with the deliberate advice of his council, as deſcribed by Froiſſart, will

(*c*) Commines, L. 4. Ch. 9. 10.
(*d*) Id. L. 3. Ch. 11.

ſet

ſet before us very plainly the lax ideas upon this ſubject that were then entertained.

When Charles V. ſent Envoys to him at Bordeaux, to ſummon him to anſwer certain complaints which were preferred againſt him: he was at firſt, ſays Froiſſart, quite melancholy at the affront. His barons and knights, (who it muſt be obſerved were then the moſt courteous and moſt accompliſhed in Europe,) councelled him *to put the meſſengers to death*, as the beſt recompence he could give them for their freedom; but this he forbade. Underſtanding, however, that they had come to him without a ſafe conduct, he ordered them immediately to be purſued, taken, and thrown into priſon, which was executed with joy, adds the hiſtorian, by his council. (*e*) This conduct of the Prince of Wales made Charles more cautious in his declaration of war againſt his father, to whom, fearing perhaps the ſame ſort of treatment, he ſent his defiance by the hands of a mere ſervant; and the Ambaſſadors at that time at the court of England, are repreſented as *tous joyeux* when they found themſelves ſafe within the fortreſs of Boullogne. (*f*). *Villaret* in repreſenting this fact obſerves that the French King ſent his declaration by a ſervant, fearing that the *law of nations* would not be more reſpected at London than it had been at Bordeaux. (*g*)

The term Law of Nations, however, is his own; Froiſſart relates the naked circumſtance of the caſe, and does not ſeem even to hint that the procedure of the Prince was contrary to the notions of right at that time received. In fact, notwithſtanding the chivalry of the age, which, as will be ſeen, produced much change in the laws of war; caſes of nicety

(*e*) Froiſſart, V. 1. Ch. 248.
(*f*) Id. Ch. 251.
(*g*) Hiſt. de Fr. 1. 389.

were

were too little underſtood, and cuſtoms were far too irregular to build upon them as a ſettled ſyſtem; Villaret therefore, not only in this, but in other inſtances of his excellent work, goes too far in attributing any preciſe idea of the law of nations to theſe ages, which he conſtantly does when he ſpeaks of their violation. In 1350, Raoul Comte d'Eu, conſtable of France and priſoner of the king of England, obtained leave to return home on his parole to procure his ranſom, and treat of ſome matters of ſtate. His conduct at *Caen*, where he had been taken, is allowed to have been ſuch as to render his fidelity to France ſuſpected; and he was painted to the king, JOHN II. as a partizan of EDWARD, come to ſtir up ſedition. For this, and for other treaſons which *it is expreſsly ſtated he had confeſſed*, he was beheaded; and *Villaret* calls this, not only a breach of the law of France, but of the law of nations. (*h*) In the forms of his proceſs, that the laws of France were violated, may poſſibly be true; and undoubtedly according to the comprehenſive and ſcientific mode in which the law of nations has been treated by the moderns, JOHN may be ſaid to have been guilty of a breach of that law alſo, by executing a man who, though his own ſubject, was, as a priſoner of another, civilly dead with reſpect to him. But whether the ſtate of the law in ſuch times as we have deſcribed, admitted of ſuch nicety of ſpeculation, and whether, conſequently, Villaret has not, in common with others, fallen into the fault of ſuppoſing the law of nations to be always the ſame, may be made a reaſonable queſtion.

Inſtances in truth perpetually occur, both before and after the above-mentioned tranſaction of the Prince of Wales, in which the rights of Ambaſſadors and public meſſengers were ſet at defiance. In

(*h*) Hiſt. de Fr. 1. 15.

the

the year 1258 ELIZABETH, queen dowager of Sicily, ſent Ambaſſadors in behalf of her ſon to MAINFROI, who had poſſeſſed himſelf of the kingdom; and theſe deputies exerciſing their function with too much freedom, were ſeized and put to death by that hardy uſurper. (*i*) The Ambaſſadors alſo whom ſhe ſent to the POPE on the ſame ſubject, by his contrivance met with the ſame fate. (*k*) In 1350 the Pope's legate, the repreſentative, not merely of a temporal ſovereign, but of the ſpiritual Father whom it was impiety to oppoſe, was hung up by the heels by DON PEDRO, king of Arragon, till he took off an excommunication he had ventured to publiſh; (*l*) and in 1464 LEWIS XI. in the caſe of the arreſt of *Rubempre*, by the Count of *Charolois*, held publicly by the mouth of his chancellor, before PHILIP duke of BURGUNDY; *that the orders he had given him (Rubempre) to arreſt the agent of Brittany going to the court of Edward IV. his enemy, were perfectly legitimate*, although at that time there was peace between Brittany and France. (*m*)

But if theſe proceedings ſhould be eſteemed mere violations of law, (and it muſt be acknowledged ſome of them are quoted more with a view to ſhew what was actually done, than what was actually legal;) there is one caſe in the thirteenth century, ſufficiently remarkable, and which is expreſsly ſtated to have been the conſequence of *received* cuſtom. The patriarch of *Jeruſalem*, ſays *Joinville*, had become the captive of the Emirs of *Ægypt*, " Suivant " la coutume alors uſitee en PAYENNIE, comme en " CHRETIENTE *que quand deux princes eſtoient en* " *guerre, ſi l'un d'eux, venoit a mourir, les Ambaſſa-* " *deurs qui s'eſtoient envoyes reciproquement, demeurio-*

(*i*) Burgin. 2. 128. (*k*) Id. Ib.
(*l*) Mod. Un. Hiſt. 17. 195.
(*m*) Commines, L. 1. Ch. 1

" *ent,*

" *ent, priſonniers et eſclaves.*" (*n*) It may be ſuppoſed that this law of nations related only to the practice of war between *Chriſtians* and *Saracens*, which, as we ſhall ſee, was often very different from that of the Chriſtians among one another; the paſſage cited, however, obſerves expreſsly that it was the cuſtom among *Chriſtians* as well as Pagans.

Be this as it may, theſe examples, taken from the hiſtory of various nations, and various parts of the period before us, demonſtrate the little regularity that had hitherto been introduced, even into a part of the law of nations which on account of its neceſſity is almoſt the firſt that is attended to by all communities. The very *heralds*, without which war can hardly be carried on, were not always ſafe. The duke of BEDFORD, regent of *France*, the moſt accompliſhed prince of his age, loaded the *Guienne* herald, ſent to him by the famous *Pucelle*, with chains; (*o*) and though there is nothing which appears to have diſtinguiſhed our Edward IV. for cruelty beyond other generals of the time, yet when LEWIS XI. commanded one of his ſervants, who was not a regular herald, to aſſume the habit of one, and bear a meſſage from him to the Engliſh camp, he is ſaid by *Commines* to have fallen upon his knees and bewailed his fortune, as one ſent to inſtant death. (*p*) *Molloy* makes a queſtion upon this, whether the circumſtance of the meſſenger's not being a regular herald, would have entitled *Edward* to have uſed violence towards him. (*q*) The queſtion is not incurious, as the laws concerning heralds were, from

(*n*) Joinville vie de St. Louis, P. 67.

(*o*) Villaret, 3. 408. Poſſibly he might be excuſed by the circumſtances of the times. The duke for his nephew, *crowned king of France*; the herald ſummoned him to yield up the kingdom to Charles VII. the true king, and things were thus in a ſtate of civil war.

(*p*) Commines, L. 4. Ch. 7. (*q*) De Jur. Mar.

their

their univerſality, part of the laws of nations; and they were known by a particular habit, which it would have been dangerous if every one had been allowed to aſſume at pleaſure. As it was, the meſſenger (there being no herald in the camp of *Lewis*,) was obliged to make himſelf a coat of arms out of the enſign belonging to a trumpet, *(r)* and poſſibly his fright might have ariſen from his knowledge that he was ſo far an impoſtor, as not to have been regularly cloathed with the character he was about to undertake. If this were ſo, it is a remarkable part of the law of nations. In the preſent day, any one taking upon him the enſigns of office, and actually employed by men having ſufficient authority, would be conſidered in his perſon as ſacred and inviolable.

In times like theſe, men had not quitted the only, or at leaſt the chief mode by which miſtruſtful and perfidious nations endeavour to exact the preſervation of good faith. We ſhall perhaps, in a future work, have occaſion to treat of the general ſubject of *Hoſtages:* but as this is merely an hiſtorical enquiry, it will be ſufficient in this place to mark the ideas entertained at this time of the rights concerning them. They were violent to a degree of cruelty and blood, it being imagined (and the practice accorded with the theory,) that an hoſtage was delivered up *to the abſolute will and licence* of the perſon receiving him; and as good faith was no part of the character of the times, the lot of theſe unfortunate men but too often challenges our pity. Severe impriſonment, mutilations, and death in cool blood, attend them everywhere throughout the hiſtories. The Emperor HENRY IV. returning from the conqueſt of Sicily, carried away with him the principal lords and prelates of that kingdom, as hoſtages for the fidelity of the reſt. The kingdom riſing againſt

(*r*) Commines, ub. ſup.

him

him in his abſence, they were all puniſhed with the loſs of their eyes. (*s*) The city of *Moiſſac* in Gaſcony, having given hoſtages to ſurrender by a particular period if not ſuccoured, the duke of *Anjou*, ſays Froiſſart, came there with his army and hoſtages at the appointed time, and prepared to put them to death, in caſe the commanders broke their faith. The town *knowing the cuſtom of war*, ſurrendered immediately. (*t*)

But the moſt ample elucidation of the cuſtom is to be found in the hiſtory of the ſiege of a little caſtle in Brittany belonging to Robert *Knollys* a famous general of Edward III. It is attended with ſuch regular and deliberate cruelty, proceeded ſo plainly upon principles, and deſcribes ſo fully the manners of the time, that it deſerves to be related in all its circumſtances.

Knollys, lord of the caſtle of *Derval*, near Breſt, being called away to that city, left it beſieged under the command of James *Bruce* (or *Broſſe*). The French preſſing the ſiege, *Bruce* agreed to ſurrender, provided it was not relieved within a certain time, and gave hoſtages for the performance of his agreement. In the mean while *Knollys* returning from Breſt, ſent word to the French commander (who waited without hoſtility, the expiration of the time appointed,) that he would not keep conditions made in his abſence by a perſon who had not ſufficient power, and bade him retire or he would attack him. The French replied that they would keep on the defenſive till the end of the period fixed for delivering up the caſtle, and they ſhould then know what part to act. The points of difference in this curious caſe, which was plainly a SPONSIO, as it is called by writers on the law of nations, are not now before us;

(*s*) Heiſs. Hiſt. d'Allemagne 1. 112. an. 1197.
(*t*) Froiſſart, v. 1. ch. 320.

we

we have merely to mark the fate of the *hoſtages*. Upon the expiration of the term, *Knollys* perſiſting to keep the caſtle, the duke of *Anjou* who had taken the command of the ſiege, and who, according to the hiſtorian from whom I extract this account, was as brave and generous a prince as any in Europe, was embarraſſed what to do with the hoſtages he had received, and aſked the advice of *Garcias du Chatel*. The latter, "who knew what humanity demanded, not leſs *than what the law of arms awarded*," told him that *although the rigour of war gave him the right to put theſe unfortunate men to death*; yet as it was not their fault that Knollys continued obſtinate, it would be more merciful to reſtore them. The duke acquieſced, and DU CHATEL conducted them out of the camp. In this ſtate of the affair, he was met by OLIVER de CLISSON, one of the French generals, and ſirnamed, for his ſeverity, the *butcher*, who brought back the hoſtages to the duke, and repreſented to him that by this ill placed mercy he only encouraged the enemy to break their faith. By this, and other ſtrong arguments, he obtained from him the power of doing as he pleaſed with them, and the unhappy men accompanied by an executioner, were inſtantly led down to the ſide of the caſtle ditch, where *Knollys* was ſummoned to a conference. He appeared at a window, and CLISSON ſhewing him his friends, aſked him if he would ſuffer them to die for his breach of faith. He replied that he was guilty of no breach of faith, that the blood of theſe innocent men would therefore be upon the head of CLISSON, who would thus well earn his ſirname of butcher, and that if he perſiſted, he knew how to retaliate. (*u*) The ſavage CLISSON executed

(*u*) The other particulars of Knolly's anſwer are a curious mark of the reſignation that was expected from hoſtages in thoſe days. "Robert Knolles repartit, les gentiz hommes que vous "tenez

executed his threat, (to the regret, adds Froiſſart of all the army, two hundred of whom wept for their deaths,) and on the inſtant a ſcaffold was ſeen puſhed out from the window where *Knollys* had appeared, and four French gentlemen being brought forth, were beheaded on the ſpot, and their heads and bodies thrown down into the ditch among their friends. Such were the particulars, and ſuch the exactneſs of cruelty, in a caſe by no means incurious in the laws of war as admitted by our anceſtors. (*v*)

Another great point which peculiarly marked the want of regularity and order which formed the character and the diſgrace of the times, was that liberty which individuals claimed to do themſelves right, upon foreign injury; and their conſequent danger of falling into the extreme of diſorder.—The Kings and Magiſtrates of the time, had ſeldom the power, and not always the diſpoſition to exert one of the moſt important functions of the Sovereignty committed to their hands, namely the defence of their ſubjects from external inſults; and in this weakneſs, or this indolence, they allowed the martial ſpirit of the age to take its courſe, and the private ſubjects of different monarchs waged very cruel wars againſt one another, for a conſiderable length of time, without calling out the force of their reſpective nations in their defence. I ſpeak not here of the famous *private wars* of the Barons, which were the conſequences of actual Sovereignty, and will be

" tenez ſont mes amis il eſt vray, et il n'y'a rien que je ne don-
" naſſe pour les ſauver de votre inhumanité; *mais ces* amis *ſont*
" *genereux*, et ils amient mieux mourir que de m'obliger à faire
" une choſe honteuſe, comme celle de me rendre ſous pretexte
" d'un traité nul et invalide."—Vie de Bertſ. du Gueſcelin. 246.

(*v*) Ib. & Froiſſart, v. 3. ch. 6. The latter ſays *Knollys* (or *Canolls* as he calls him,) executed *all* his priſoners.

fully

fully reviewed under another head, (*w*) but thoſe heterogeneous depredations which were ſo often ſuffered *by way of Repriſals*.

Repriſals, under proper control and attention, come regularly within the ſcope of the Law of Nations as obſerved at preſent; and although I am aware that there is a great authority for the contrary opinion, (*x*) yet it is upon the whole ſettled, that no *private* hoſtilities, however general, or however juſt, will conſtitute what is called a legitimate and public ſtate of war. (*y*) So far indeed has my lord Coke carried this point, that he holds, if *all* the ſubjects of a king of England were to make war upon another country in league with it, but without the aſſent of the king; there would ſtill be no breach of the league between the two Countries. (*z*)

In the times before us various were the inſtances in which individuals poſſeſſing no public character, and authorized by no public commiſſion, aſſumed, and were almoſt encouraged to aſſume, the province of redreſſing the wrongs that were offered them from without. I will ſelect one, which was not leſs remarkable for the account which it affords us of the ſentiments of our anceſtors, than it was important in the end, by involving the whole force of two mighty nations in a ſerious war.

In 1292 two ſailors, the one Norman, the other Engliſh, quarrelled in the port of Bayonne, and began to fight with their fiſts. The Engliſhman being the weaker, is ſaid to have ſtabbed the other with his knife.—It was an affair which challenged the intervention of the civil tribunals, but being neglected by the Magiſtrates, the Normans applied to their King, (*Philip le Bel*) who with neglect ſtill

(*w*) Chap. XII. On the Influence of the Feudal Syſtem.
(*x*) De Witte. (*y*) Vattel, L. 2. ch. 4.
(*z*) Fourth Inſt. 152.

more

more unpardonable, *desired them to take their own revenge.* They instantly put to sea, and seizing the first English ship they could find, hung up several of the crew, and some dogs at the same time, at the mast head. The English retaliated *without applying to their Government,* and things arose to that height of irregularity, that (with the same indifference on the part of their kings,) the one nation made alliance with the Irish and Dutch; the other with the Flemings and Genoese. *Two hundred* Norman vessels scowered the English seas, and hanged all the seamen they could find. Their enemies in return fitted out a strong fleet, destroyed or took the greater part of the Normans, and giving no quarter, massacred them, to the amount of fifteen thousand men. The affair then became too big for private hands, and the Governments interposing in form, it terminated in that unfortunate war, which by the loss of *Guienne* entailed upon the two nations an endless train of hostilities, till it was recovered. (*a*)

While such laxity of discipline and of true subordination prevailed, we can little wonder if the passions of private individuals were allowed to enter into, and mingle with the public administration of the laws of war. When any one therefore had distinguished himself in zeal, or severity, or skill in the destruction of enemies; far from respecting him, he was sometimes marked out for a vengeance, which extended itself even to innocent persons. Thus when *Geoffry Payen,* a French Captain, had been taken by some English troops in the wars of EDWARD III. they at first contented themselves with requiring him to follow them to the town of *Benon,* whence they had sallied; but upon questioning him, and learning that he was in the service of de CLISSON their mortal enemy, they then replied, " Il faut

(*a*) Heming. 39, 40. T. Walsing. 58, 60. Velly. 4. 31, 32.

" mourir, puis que tu es a ce traiſtre *Cliſſon*, le plus " cruel de nos ennemis. La deſſus, en haine de ſon " Capitaine," continues the hiſtory, " ils tuerent ce " brave Gentillhomme, ou pour le moins laiſſerent " pour mort."—In return for this, De Cliſſon took an oath that he would not ranſom any priſoners for a whole year, but would put every one to death who fell into his hands. (*b*)

In theſe times alſo, there exiſted a cuſtom in full vigour which is to be traced to very remote antiquity, but which the mildneſs of modern improvements ſeems to have totally aboliſhed; I mean the practice of exacting *ranſoms* for the liberty of priſoners.

Originally, from the ſuppoſed right of putting captives to death, it was held lawful to reduce them, as an act of mercy, to perpetual ſlavery; of which in the preceding chapters we have ſelected various inſtances; nor was the practice wholly worn out, even ſo far down as the fourteenth century. *Lewis Hutin* in a letter to *Edward* II. his vaſſal and ally, deſiring him to arreſt his enemies the *Flemings*, and to make them *ſlaves* and ſerfs. (*c*) Men however who made war for booty as well as from a thirſt of vengeance, were ſoon willing to exchange a priſoner whoſe life might be burthenſome, and whoſe death was indifferent to them, for advantages more convenient and manageable. Accordingly, even the *Scandinavian* and *Scythian* nations, whoſe paſſion for ſlaughter ſo often makes us ſhudder, condeſcended at laſt to accept of ranſom for their captives; and during the ages we are examining, the cuſtom appears to have grown univerſal and been regulated by fixed and known rules. The chief among them ſeems to have been, that the priſoner ſhould remain

(*b*) Vie de Bert. Du Gueſc. 224, 225.

(*c*) " Mettre par deveres vous, ſi comme forfaiz à vous, *Serfs* " *et Eſclaves a touz jours.*" Rymer 3. 488.

the property of him who had the fortune to take him, though in ſome inſtances the king, as beſt able to judge of the expediency of giving liberty to particular enemies, claimed a right to retain them himſelf, at a price much inferior to that which the captor might have expected. It is ſaid by a French antiquary, that the king of France had the privilege of purchaſing any priſoner from his conqueror on the payment of 10,000 livres; (*d*) and it is remarkable that the money paid by EDWARD III. to *Denis de Morbec* for his priſoner JOHN king of France, taken at *Poitiers*, amounted to that preciſe ſum. (*e*) Edward afterwards exacted three millions of gold crowns, amounting, it is computed, to 1,500,000l. of our preſent money, for the liberty of his illuſtrious captive, (*f*) and a kind of reproach on ſuch an immenſe diſproportion, eſcapes from *Villaret* in this part of his hiſtory. (*g*)

The reproach is unmerited. However juſt it might be, according to the maxims of the time, that the conqueror ſhould be rewarded for his valour and addreſs in capturing a potent or dangerous enemy; the power of giving him liberty at pleaſure, might have been very prejudicial to the ſtate; and as every ſoldier fought for the good of the common weal, as his own, it was not a debt of juſtice to give him the whole, or even the greater part of the profit upon the priſoner. In the caſe of *John*, whole Towns and Provinces were yielded up to the ſtate, beſides the immenſe ſum above-mentioned: it cannot be ſuppoſed that *De Morbec* had any right to theſe! It was probably upon ſuch principles that *Henry* IV. forbade the *Percies* to ranſom their priſoners taken at

(*d*) Paſquier recherches de la Fr. L. 4. ch. 12.
(*e*) Villaret 1. 248. (*f*) Id.
(*g*) Hiſt. de Fr. 1. 248.

Holmdown. They were the moſt illuſtrious of the Scotch nobility, and the king perhaps in retaining them, had views of ſtate which looked much farther than the mere advantage of their *ranſom*. He ſeems to have publiſhed this prohibition to the *Percies*, in conſequence of his prerogative, and though the proclamation acknowledges their right, (*h*) yet by his haughty perſeverance in the exertion of his claim, he drove that powerful family into their famous, and, to themſelves, fatal rebellion. (*i*)

It was thus however, for the moſt part, in the option of the perſons in poſſeſſion of a priſoner, whether or not to ranſom him, the priſoner having no right to inſiſt upon his liberty, however great the advantage he might offer in exchange for it; and in this, they were governed by motives of policy, drawn from his perſonal importance. ENTIUS king of *Sardinia*, the ſon of the Emperor FREDERIC II. was of ſuch conſequence to his father's affairs, from his activity and ſervices, that upon being taken priſoner by the *Bologneſe* army in 1248, no ranſom that could be offered was able to obtain his liberty, and he died at the end of a captivity of four and twenty years. (*k*) CHARLES V. of France, purſued the ſame conduct towards the famous *Captal* of *Buche*, whom he purchaſed of the gentleman who took him for 1200 livres, (*l*) and ſhut up in the Temple at Paris, refuſing every offer made to him by *Edward* III. for the liberty of an enemy he ſo much feared. (*m*) Upon the ſame principle, it was the dying injunction of HENRY V. not to releaſe the duke of ORLEANS and the Comte D'EU who had been captured at *Agin-*

(*h*) Rym. 4. pt. 1. p. 36.
(*i*) Rapin Thoy. v. Sub. an. 1403.
(*k*) Heiſs Hiſt. de l'Emp. 1. 127. Pfeffel Droit Pub. d'All. 1. 398.
(*l*) Froiſs. v. 1. ch. 311. 328. (*m*) Id. v. 1. ch. 328.

court,

court, till his ſon, then an infant, was capable of governing; (*n*) nor were thoſe noblemen allowed to ranſom themſelves till ſeventen years afterwards. (*o*)

When reaſons of ſtate however did not interfere, the general rule before mentioned, took place, and the conqueror made what profit he could of his priſoner. *Froiſſart* ſpeaking of the conſequences of the battle of *Poitiers*, ſays, thoſe who had taken priſoners made as much of them as they could, " car a " celuy, qui prenoit priſonnier en la battaile, de " leur coſte le priſonnier eſtoit ſien, et le pouvoit " quitter ou ranconner a ſa volonte. He adds that the Engliſh became very rich in conſequence of that battle, as well by ranſoms as other plunder. (*p*)

In a rencontre between a Scotch and Engliſh knight, the ſame hiſtorian ſays, the former purſued the latter, et pour *vaillance et pour gaigner*, and indeed according to M. Sainte Palaye (*q*) the ranſom of priſoners was one great mean, by which the knights of old times were enabled to ſupport the magnificence, for which they were remarkable.

In the next century, the right continued the ſame, and by the articles of war eſtabliſhed by *Henry* V. previous to his invaſion of France, it was determined that " be it at the battle, or other deeds of arms " where priſoners be taken, who that firſt may have " his *faye* ſhall have him for his priſoner, and ſhall " not need to abide by him." (*r*) Mr. Barrington underſtands *faye* to mean the promiſe given to his captor by the perſon taken, that he would remain

(*n*) Rapin. ſub an. 1422.
(*o*) Villar. Hiſt. de Fr. 4. 129. 131.
(*p*) Froiſs. v. 1. ch. 166. & v. 3. ch. 128.
(*q*) Mem. ſur la Chevalerie 1. 309.
(*r*) MS. collect. of Petyt. preſerved in the Library of the Inner Temple.

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his priſoner, (*s*) in which he is ſupported by various paſſages in the French hiſtorians, " donner ſa foi," being the term made uſe of when a perſon agreed to remain captive. (*t*)

It is not unreaſonable to ſuppoſe with the author laſt mentioned, that the price of a man's ranſom was, in general, one year's revenue of his eſtate, (*u*) and the reaſon which he aſſigns for it is farther ſupported by the cuſtom of allowing men one entire year of liberty, in order to procure the ſum agreed upon. In theſe his endeavours he was alſo conſiderably aſſiſted by the proviſions of the feudal law, which flouriſhed in the height of its vigour during the ages before us, and by which, every vaſſal or tenant was obliged to aſſiſt his lord with a ſum propor-

(*s*) Obſervat. on the more ant. Stat. 391.

(*t*) Thomas Vercler taken by a French Eſquire at Poitiers, Froiſſart ſays *La luy creanca il ſa foy*, que récoux ou non recoux demeuroit ſon priſonnier, v. 1. ch. 163. The Eſquire received 6000 nobles for his ranſom, and is ſaid to have become a knight in conſequence of this his acceſſion of fortune.—*Bertrand du Gueſclin* ſurrounded by the Engliſh at the battle of *Auray*, CHANDOS called out to him to ſurrender, and Bertrand " luy " donna *ſa foy*, et fut ſon priſonnier."—Vie du Bert. du Gueſ. 79, Joan d'Arc being beaten in battle, ſaw the Baſtard of Vendome near her " à qui elle ſe rendit et donné *ſa foy*."—Mouſtrel. ad an. 1430. So alſo at the battle of *Agincourt*, the duke of Alençon was killed in the moment when he had ſurrendered, and the king *vouloit prendre ſa foy*. Id. v. 1. ch. 148.

(*u*) Montluc in his Commentaries ſpeaks thus of the ranſom he expected from Marco Antonio a Roman knight. Il me va en l'entendement que facilement je prendrois priſonnier ce ſeigneur, et que ſi je le pouvois attraper, j'etois riche à j'amais, car pour le moins j'en aurois quatre vingt mille ècus de rançom qui eſtoit ſon revenue d'un an, en néſtoit pas trop. From this it ſhould ſeem that there were ſettled terms upon which the captor and priſoner treated, and that they generally agreed at the rate of a year's income, qui n'eſtoit pas trop. (See Sainte Palaye, Mem. ſur la Chevalerie, 1, 309, 365.)

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tionable to the land he held, in order to redeem him from captivity. (*w*)

The ſums however which I find to have been taken of different priſoners vary perhaps more than the proportion of their revenues; perſonal conſequences as was before obſerved having no doubt much weight in determining the value. BERTRAND DU GUESCELIN, who had no eſtate at all, valued his own ranſom at 100,000 livres; (*x*) the ranſom of a king of *Majorca*, of the royal houſe of *Arragon*, about the ſame period, amounted to exactly the ſame ſum; (*y*) and DAVID king of Scotland, after eleven years captivity, paid 100,000 marks for his liberty. (*z*) The queen of *Edward* III. who may be ſaid almoſt to have commanded at the battle of Durham where he was taken, required him of JOHN COPLAND the officer who actually made him priſoner; but knowing his value he poſitively refuſed, on the plea *that no one had a right to demand him but the king*. EDWARD ſent for him to Calais, where partly as a reward for his gallantry, and partly in acknowledgment of his claim, he endowed him with 500l. a year in land, and made him a knight banneret. (*a*) CHARLES of BLOIS, captured in this period of military glory for England, agreed to pay 700,000 crowns for his ranſom, and left his two ſons hoſtages for his good faith. (*b*) The famous MICHAEL de la

(*w*) Feud. L. 2. tit. 24, Hence the ranſom of a king who was always at the head of the greateſt number of vaſſals, would naturally amount to the greateſt ſum. Mr. Barrington who, had he purſued his communications on this ſubject, would have rendered this part of our work unneceſſary, has quoted ſome antient lines (Obſerv. on the Stat. 391.) relative to Hinckſton Hill, in Cornwall, ſuppoſed to be full of copper.

" Hinckſton Hill, well wrought,
" Is worth a *king's ranſom*, dearly bought."

(*x*) Vie de Bert. du Gueſc. 137.
(*y*) Froiſſart. v. 1. ch. 99. (*z*) Rym. 5. 65, 68.
(*a*) Rym. 5. 542. & Froiſſart, 1. 139. (*b*) Rym. 5. 862.

POLE, duke of Suffolk, paid 20,000l. ſterling when no more than a ſimple knight. (*c*) The duke of *Alençon* paid 200,000 crowns, for which he was forced actually to ſell a part of his eſtates to the duke of *Bretagne*. (*d*) Even the loweſt caprice ſometimes governed the demand, where money was not a great object. LEWIS XI. having taken WOLFAING POULAIN, an officer of confidence of MARY of BURGUNDY, inſiſted upon ſome famous hounds belonging to the ſeigneur de *Boſſu*, as the only ranſom he would take. *Boſſu* at firſt would not part with his dogs; the king was obſtinate, and a number of couriers paſſed between the parties on the ſubject, which was made an affair of ſtate before it was ſettled. (*e*)

When ſuch immenſe advantages were to be made of the perſons of men of conſequence; to take priſoners became a very primary object with thoſe who went to war; and it operated well for humanity in one reſpect, by ſaving many gallant lives which might otherwiſe have been forfeited.

That they were forfeited in default of ability to pay, appears but too clearly in various examples. In 1441, which is far advanced in the period before us, the Engliſh priſoners taken at *Fonticiſe* were brought to Paris by CHARLES VII. a prince remarkable for mildneſs in that age. They were chained by the neck like dogs, and expoſed nearly naked to the gaze and exultation of the populace. Thoſe who could pay their ranſom, were then ſet free; thoſe who could not, who were by far the greater number, were bound hand and foot and precipitated

(*c*) Speed. 675. (*d*) Villaret 3. 389.

(*e*) Garnier Hiſt. de Fr. 2. 23. By this time alſo it perhaps had grown into a cuſtom to releaſe the firſt priſoner made after the commencement of hoſtilities, without ranſom. "Le Roy "d'Angleterre commanda qu'on donnaſt congé à ce Valet, *veu* "*que c'eſtoit leur premier priſonnier.*"—Commines, L. 4. ch. 7.

into the Seine. (*f*) So little had the laws of war gained ſince the time of the *Avars*, who eight centuries before, had committed preciſely ſuch an act. (*g*) Under the reign of Louis XI. the ſame fate, and for the ſame default, was experienced by the inhabitants of *Liege*; (*h*) and Henry V. when he ordered the deaths of his priſoners upon the alarm after the battle of *Agincourt*, ſaved thoſe only from whom he expected conſiderable ranſoms. (*i*)

Its effects however in another reſpect were diſadvantageous, in ſo far as that it held out improper motives for war, and temptations, when war was declared, to commit violence and treachery.

The Engliſh are repreſented by Commines, as always deſirous of a war with France, from the recollection of the riches they had ſo often acquired, not only by the plunder of Towns, but the advantages made of numbers of princes and lords whom it had been their fortune to take. (*k*) The ſame diſpoſition, and proceeding from the ſame motive, is mentioned by Hollinſhed under the reign of Richard II. (*l*) The ſeizure already mentioned of *Richard* I. and *James* of Scotland, in times of peace, were perhaps owing in part to the avarice of the Captors. In 1387 Oliver de Clisson conſtable of France, being with *ſafe conduct* at the court of the duke of *Bretagne*, between whom and himſelf there had been old hatred; was ſhut up in a tower, into which he had entered at the duke's deſire to examine its ſtrength. He was at firſt ordered by the ſavage Breton to be tied in a ſack and thrown into the ſea;

(*f*) Monſtrelet ad an. 1441.
(*g*) See Chap. VIII.
(*h*) Garnier's Hiſt. de Fr. 1. 169.
(*i*) Rapin.
(*k*) Commines, L. 6. ch. 2.
(*l*) Vol. II. ad. an. 1383. Hence alſo the ſturdy Hotſpur is not unnaturally repreſented in his dreams to be talking of "Priſoner's ranſom, as well as of ſoldiers ſlain."—Firſt P. Hen. IV. Act. 2. Scene 6.

but

but the latter being troubled in conſcience, was afterwards glad to find his orders had not been executed; notwithſtanding which, CLISSON was not releaſed but upon a treaty of ranſom for 100,000 livres. *(m)* During the wars of PHILIP and EDWARD III. there aroſe many a ſoldier of fortune, in other words freebooters, who no doubt were encouraged in the profeſſion by the hope of making money by ranſoms. CROQUART, a famous leader of what was called the companies, is deſcribed as having become extremely rich by ranſoming caſtles and towns, which, as he was then in the ſervice of no ſtate, he could have had no right to attack.

In 1367, ſeveral knights of *Suabia* having aſſociated to perform deeds of chivalry, were tempted to uſe their power for the very deſtruction of the good order they had ſworn to ſupport. A rich Count of *Wirtenberg* reſiding in ſecurity at his caſtle at *Wildbad*, it came into the heads of theſe knights that they *could procure a noble ſum of money for the ranſom of him and his family*; and for this purpoſe, headed by a Count *Eberſtein*, they attacked him, though without ſucceſs. (*n*)

A fuller and more regular caſe appears in the conduct of *Thomas* of *Canterbury*.

While the duke of *Lancaſter* beſieged *Dinant*, in Brittany, a ſuſpenſion of arms was agreed upon, during which the ſoldiers of each party had free liberty of ingreſs and egreſs, at their reſpective ſtations. One of the brothers of *Bertrand du Gueſcelin*, taking advantage of this, was exerciſing his horſe in the fields, when he was met by a knight called *Thomas* of *Canterbury*, who ſeeing him richly dreſſed and well mounted, and finding him to be a bro-

(*m*) Froiſſart. v. 3. ch. 57.
(*n*) Spitler's Hiſt. of Werten quoted by Putter. B. 3. ch. 3.

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ther of *Bertrand*'s, immediately ſeized him and demanded a thouſand florins of gold for his ranſom. It was in vain that the priſoner urged the truce in his defence.—*Canterbury* perſiſted, and *Bertrand* coming into the camp to complain before the duke of *Lancaſter*, he aſſerted roundly, that the capture was legitimate according to the rules of honour, and that he would prove it body to body. The duke, inſtead of preventing the combat, and giving liberty to the priſoner, was judge of the liſts; and it was not till *Bertrand* was victorious that his brother was reſtored. (*o*) In this caſe there could now be no difficulty, and nothing proves more fully than the circumſtances related, the crude and irregular ideas of juſtice which were entertained during theſe times. No ſerjeant of a modern army, but would have condemned a man in the firſt inſtance, who had behaved like this lord *Thomas* of *Canterbury*; yet notwithſtanding the repreſentations of *du Gueſcelin*, whoſe genius in the laws of war went beyond that of his cotemporaries, a battle was to be fought, and much ceremony gone through, before the commander in chief, a prince of royal blood, and eminent, according to the account, for his knowledge in thoſe laws, could act with deciſion. Though juſtice was at laſt done, it was only the conſequence of the ſucceſs of the injured party, and it is remarkable that the whole conduct of the duke of *Lancaſter* is praiſed as a noble example of honour. (*p*)

The avidity with which men ſought for priſoners made it alſo often dangerous to the conquered parties themſelves. A man of conſequence known by his arms, was not only marked out above the reſt during the battle, but became an object of ſcramble and contention afterwards. At *Poitiers* the king of France

(*o*) Vie de Bert. du Gueſcelin. 32. et inf. (*p*) Id. Ib.

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was nearly torn to pieces by the ſoldiers, who claimed him as the great prize that was to enrich them. He was quickly carried off from *Morbec* his captor, and the cry of "It was I that took him!" reſounded among all who were near him. Thus preſſed, he was forced to cry out to them, "Gentlemen, gen-"tlemen, lead me quietly to the prince of Wales, "and do not quarrel about me, for I am of ſuffici-"ent conſequence to make you all rich." (*q*) In this ſituation he was found by the earl of Warwick who was ſent to enquire for him, and who reſcued him from the crowd. At the battle of the Bridge of Luſſac, *Carlonnet* the French commander, fell into the hands of five or ſix ſoldiers who diſputed ſo warmly about his poſſeſſion, that to end the difference they were fairly going to kill him, when he was taken from them by an Engliſh knight. (*r*) At the battle of *Agincourt* eighteen French gentlemen had entered into an agreement to direct all their attacks againſt king HENRY, (moſt probably with the view of acquiring a fortune by his capture,) and hence one reaſon why the heat of battle was greateſt about his perſon. The eighteen gentlemen periſhed in their attempt. (*s*) *Charles de Beaumont*, ſeneſchal of St. Die, is ſaid to have died of regret at loſing the great ranſom he might have gained had he taken the duke of *Burgundy* priſoner at the battle of *Nanci*, inſtead of killing him as he did, without knowing who he was. (*t*)

I cannot quit this ſubject of ranſom, though the account of it may appear already but too long, without obſerving that the value of a priſoner's liberty was conſidered as a ſpecies of wealth, and regular-

(*q*) Froiſſart, v. 1. ch. 164. Seigneurs, Seigneurs, menez moi courtoiſement, &c.

(*r*) Vie de Bert. du Gueſc. 201.

(*s*) Chron. de Fr. ad. an. 1415.

(*t*) Commines, L. 5. ch. 10. n. 3. Garnier Hiſt. de Fr. 1. 389.

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ly transferred from one to another like any property. In older times, as we have ſeen, the priſoner was actually a ſlave, and ſold as ſuch according to his qualities and accompliſhments. In the ages before us, he was ſold, not on account of his perſonal utility, but his ability and willingneſs to pay a certain price for his freedom; or the value of which his detention was to the buyer. Hence inſtead of being allowed his liberty in order the better to perform the functions of a ſervant, it was the buſineſs of thoſe who poſſeſſed him to keep him under cloſe guard. COEUR DE LION was ſold, to uſe the expreſſion of his Ambaſſador at Rome, like an ox or an aſs, (*u*) to the Emperor, who wanted to make money by his ranſom: and PHILIP AUGUSTUS was long in treaty for him, in order to get rid of a powerful and irreconcileable enemy. *Lewis* XI. bought the baſtard of *Burgundy*, taken priſoner by *Rene* duke of *Lorrain*, for 10,000 crowns. (*w*) He had before that, bought *William* of *Chalons* prince of *Orange*, of the Sieur *de Croſle*, who had taken him priſoner, for 20,000 crowns, and as the prince was not able to repay him, required the ſovereignty of his whole principality in exchange for his liberty. The poſſeſſors of the famous *Pucelle*, ſold her to the Engliſh for 10,000 livres and a penſion of 300; (*x*) and the earl of *Pembroke*, being taken priſoner by *Henry* king of *Caſtile*, was paid over, (his ranſom valued at 120,000 livres) to *du Gueſcelin*, in part of the purchaſe money of ſome eſtates which that General had ſold. The ranſoms of ſeveral other Engliſh priſoners were ſold at the ſame time for theſe Spaniſh eſtates. The money for the Earl however, as that nobleman was ill when he was transferred, was not to be paid

(*u*) Ac ſi bos eſſet, vel aſinus, vendidit.—Mat. Par. ad an. 1194.

(*w*) Garnier, 1. 335. (*x*) Paſquier. Recher. de la Fr. 4. 12.

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by his Bankers at Bruges, till he ſhould be *wholeſome* and *plump*, " Quand il ſeroit ſain et en bon point." Unfortunately for *Du Gueſcelin*, Pembroke died before he left France, and thus, ſays Froiſſart, the Conſtable loſt his money. (*y*) Hence it appears that in theſe transfers, the receiver of the priſoner took upon himſelf the riſk of loſing him, and in caſe of death before payment, had no demand upon the perſon who ſold him.

Ranſoms were ſometimes transferred as preſents inſtead of money, which appears in the caſe of one of the family of *Blois*, preſented by RICHARD II. to the duke of *Ireland*, who ſold him to *Oliver de Cliſſon* for 120,000 livres. (*z*) It ſhould ſeem alſo that when any doubt aroſe concerning the priſoner's willingneſs or ability to pay, *ſecurities* might be taken as in the regular tranſactions of barter and ſale; and this was the caſe of *Henry* Duke of *Brunſwick* in 1404, who being taken priſoner by the Count *de la Lippe*, was ranſomed for one hundred thouſand crowns, part of which was paid by the *ſecurities* which he gave on that occaſion. (*a*) In caſes, however, which occurred within the Empire, its Chief claimed the right of annulling ſuch agreements, which in the above tranſaction was actually done on the plea of a defect in the cauſe of the war between the parties, by the Emperor Robert. (*b*)

But the ſtrongeſt example of regularity in transfers, and that, in a caſe when the captive was not a priſoner of war, is ſhewn in the tranſactions concerning *Zizim*, brother of *Bajazet*, Emperor of the Turks. That prince who had pretenſions to the throne, and had been beaten in battle by the Sultan, fled for refuge to the knights of Rhodes. The knights fearing to draw down upon them all the forces of Bajazet,

(*y*) Froiſſart, v. 1. ch. 320.
(*z*) Villaret 2. 220.
(*a*) Puffend. Introd. 3. 289.
(*b*) Rimius. Mem. de Bruns. 169.

transferred

transferred him to the king of France, *Lewis* XI. who notwithſtanding his ſuperſtitious paſſion for relics, refuſed the offer of all that could be found in the eaſtern Empire, in exchange for him, and carefully kept him in cuſtody for the knights. Seven years afterwards, it being neceſſary to obtain the favour of the Pope, CHARLES VIII. yielded him to the See of Rome, and while he was on the way, refuſed the whole kingdom of Jeruſalem which *Bajazet* offered to conquer for him in exchange for this important priſoner. He continued at Rome ſix years longer, and then was transferred back again by treaty to the king, who wanted to make uſe of him in his wild projects upon *Conſtantinople*. The laſt ſale however, if I may uſe the expreſſion, was *fraudulent*, ſince he was ſuppoſed to be poiſoned before his redelivery to the French, and died ſoon after. (*c*)

Such are the moſt prominent features of this remarkable cuſtom, which was univerſal in Europe during theſe ages, but which has now wholly diſappeared before the milder uſages introduced by modern refinement. Captivity, in the preſent times, laſts no longer than the war which occaſioned it; priſoners are ſtill exchanged, as formerly, one againſt another, but at the end of hoſtilities, thoſe which remain on either ſide, are ſet at liberty without ranſom. The old practice is now found to exiſt only in tranſactions with the Mahometan nations.

(*c*) Commines, L. 6. ch. 10. L. 7. ch 15.

CHAP.

CHAP. X.

IMPROVEMENT OF THE LAW OF NATIONS.

ALTHOUGH the ſketch which has been given of the maxims which governed the intercourſe of States during theſe times, exhibits for the moſt part ſtrong proofs of barbarity and diſorder; the natural tendency of men towards improvement, had now begun to diſcloſe itſelf. There were many cauſes for this which muſt be obvious to the reader of hiſtorical obſervation. The Storehouſe of the North had been for ſome time exhauſted; the eagerneſs of deſire after new habitations was at an end; and though the thirſt of conqueſt continued, war was no longer the ſignal for thoſe exterminating ravages which ſwept away whole nations before the victors.

It was to the mighty and comprehenſive genius of Charlemagne that Europe owed her firſt improvements; and though his immenſe Empire ſplit into fragments immediately upon his death, yet from his time the weſtern nations began to aſſume the out-lines of that form and of thoſe political inſtitutions which they at preſent wear. The aſpiring vigour of this wonderful man did more for the world than the exertions of whole ages before him. It extended every where the advantages of CHRISTIANITY; it improved the means of communication; it gave cities and a police to the foreſts of Germany; and, what was a deciſive importance, it unveiled the ſhores of the Baltic, whence a torrent of Savages had perpetually poured down upon the nations who were then ſtruggling into order. The geography, and the reſources

of

of the north came thus in ſome meaſure to be known; men were freed from the conſtant fear of extirpation in which they had lived; and, encouraged to become ſtationary, they were as wiſhful to preſerve and regulate their conqueſts, as they had before been furious to extend them. Two centuries more, reared up the ſeeds which CHALEMAGNE had ſown; and (notwithſtanding the irregularities that have been deſcribed,) from the beginning of the eleventh century downwards, we find an evident change in the face of Europe.

By this time the different nations had aſſumed the appearance of a comparative union. Alliances among ſovereigns were frequent; their independence and rights were tolerably well marked out; and though when engaged in war, their old barbariſm was but too plainly to be diſcovered; yet their various modes of connection, and the cuſtoms which governed their intercourſe, preſented a regularity of ſhape and feature which had been before unknown. A ſtrong proof of this appears in the cuſtom which began to be pretty general about theſe times, of *appealing* to neutral powers, when difference broke out among them; and this not only with a view to engage their aſſiſtance, or mediation, but alſo from their idea that the connections among them were ſo cloſe, and their governing principles ſo much the ſame, as to render it neceſſary to lay before them the juſtice of their cauſe.

In 1176 we have a remarkable inſtance of appeal and mediation in the courſe of a conteſt between the kings of *Arragon* and *Navarre*. By the deed of compromiſe made between them, they each of them depoſited four caſtles, as a pledge that they would abide by the determination of HENRY king of England. Each party was to ſend Ambaſſadors to receive his Judgment by a certain day; in the caſe of ſickneſs, captivity, or death, they were to wait each

others arrival for thirty days beyond the time appointed; and then, in default of appearance, the caſtles of him from whom the delay came, were to be forfeited to the other; but in the caſe of the death of HENRY, the Ambaſſadors were to proceed (ſubject to the ſame agreement,) to receive the judgment of the king of *France*. (*a*)

Not a hundred years after this, the juſt SAINT LEWIS ſat in judgment upon the whole cauſe of difference between HENRY III. of England, and his barons. He had been choſen their umpire in form, and each party, the king and Queen in perſon, attended him in all due ſolemnity at *Amiens*. Nor did he conſider the power thus given to him of a trifling nature; he proceeded to the moſt important acts of authority; and in the name of the Holy Trinity, annulled the famous conſtitutions of Oxford; decreed the reſtoration of the fortreſſes which had been put into the hands of the twenty-four barons, or rather Regents, of the kingdom; and finally ordained that the king ſhould be reſtored to all his legitimate rights. (*b*)

In the ſame century, the famous quarrel between the Emperor FREDERICK II. and the See of Rome was diſcuſſed in appeals and letters to the chief potentates of Chriſtendom, as well as by arms. The letters of the Emperor, particularly thoſe to the king of England, are long and argumentative, and breathe the very ſpirit of a modern manifeſto or ſtate note. (*c*) In 1334 a treaty having been entered into by the king of *Bohemia* and other princes of *Germany* with the duke of *Brabant*, under the mediation of PHILIP of VALOIS, the latter ſtyles himſelf at the

(*a*) Rymer. 1. 43.

(*b*) See theſe and a number of other articles of no leſs importance.—Mat. Par. 992. & Spiceleg. Vet. ſcrip. 643.

(*c*) Literæ Fred. ad. Amicos. M. Par. 490. 496. 520. 527.

head

head of the deed—" Nomme et eleu juge traicteur, " et aimable compoſiteur, entre hauts hommes nos " chiers amis," &c. (*d*)

But the moſt regular appeal which in thoſe days appeared, was that publiſhed at Weſtminſter by EDWARD III. againſt JOHN of France in 1356. It is addreſſed to the Pope, to the Emperor, *and to all the princes, lords, and people of* CHRISTENDOM *in general.* He complains that people of that age wiſh to palliate their own faults by blaſting the innocence of others; and he therefore believes it a duty he owes to God and to humanity, to paint the king of *France* in his proper colours. He alſo juſtifies the king of *Navarre* from the infamy imputed to him in making a treaty to deliver up Normandy, by declaring before God and on the word of a king, that no ſuch treaty had been made. (*e*) This was preparatory to the war which he afterwards declared againſt France, and no tranſactions or manifeſto of the moſt regular modern ſtate, can be more orderly or legitimate.—The next century ſaw the ſame ſort of cuſtom in the appeal made by the kings of *Caſtile* and *Arragon* to the arbitration of LEWIS XI. king of France, in 1463, (*f*) and we ſhall ſoon have occaſion to obſerve on a variety of other appeals; which, as they ſprang from a particular ſource, and will be treated of at large in another place, need not be mentioned here.

Such then was a ſmall part of the regularity of appearance, notwithſtanding the inſtances of barbarity that have been related, which Europe aſſumed during the period we have propoſed to examine. It aroſe no doubt, in ſome meaſure, from the tendency towards a certain order in affairs, which the inſtitu-

(*d*) Preuves des Troph. de Brabant. P. 160. ap Du Mont an. 1334.

(*e*) Rymer. 5. 852. (*f*) Villaret, 4. 459.

tions and political connections of CHARLEMAGNE had begun to generate. But excluſive of the conſequences of that momentous reign, they were beſides affected in the moſt ſenſible manner by a ſet of remarkable cuſtoms, common to all, which began to be viſible about the eleventh century, and which are not more important from their effects than they are curious from their nicety. They are indeed ſo different from thoſe that have been related; were ſo long known; and ſo intimately felt; that we cannot turn our view on the ſubject, without being ſtruck with the viſible and potent influence, which they had upon the laws of the world.

CHAP.

CHAP. XI.

OF THE INFLUENCE OF PARTICULAR INSTITUTIONS.

ABOUT this time, we find all the kingdoms of Europe; however diſtinguiſhed from one another in race or manners; however different in their ſtates of improvement, or marked by particular animoſities; agreeing in the main, in the five following points:

I. In adopting the remarkable policy of the FEUDAL SYSTEM; the intricate connections to which it gave riſe; and the numerous rights of mutual interference which it perpetually afforded.

II. In concurring in one general form of RELIGIOUS WORSHIP; and particularly in obeying one SPIRITUAL HEAD, whoſe uſurpations, which firſt began to aſſume ſtrength in this century, ſoon brought the whole of their temporal affairs under his dominion: and whoſe bigotry, ambition, or avarice, changed the very ſpirit of *true* Religion, and inculcated as a duty, the hatred and perſecution of all thoſe who thought differently from themſelves.

We ſhall ſoon have occaſion to obſerve the new and remarkable appearance which EUROPE aſſumed in conſequence of this; and the great difference between the Laws of War among *Chriſtians*, and Infidels, which it promoted.

III. In reviving, and even exceeding the HEROIC AGES of antiquity, and ſetting up a barrier, no leſs ſtrong than ſplendid, againſt the miſchiefs and injuſtice, which though not the immediate conſequence of the FEUDAL SYSTEM, were foſtered by it to a dangerous and lamentable degree.

The

The extraordinary and beneficial effect which *Chivalry*, the inſtitution we ſpeak of, had upon the Law of Nations for ſeveral centuries, muſt have ſhewn themſelves forcibly to every mind of common enquiry.

IV. In thoſe frequent NEGOTIATIONS, TREATIES, and POSITIVE CONVENTIONS, ſo peculiar to the *European Nations*, with all their numerous train of the *Caſus Fœderis*, *Guaranties*, *Alliances*, and *acquired* rights, which muſt of themſelves alone have been able to modify any *Law of Nations* that might have exiſted; which certainly often interfered with the Rights of Nature; and form, what the writers call, the *Poſitive Law of Nations*.

V. And laſtly, In endeavouring to ſettle a certain ſcale of Rank and Precedency among one another, upon principles peculiar to themſelves, and the religion which united them; in marking out a difference in degree between certain titles, and particular forms of government; and conſequently in forming a gradation in the pre-eminence of the various Sovereignties which compoſed the European Republic. This, although from the ſtubbornneſs and pride of various nations, it was hardly ever effected with accuracy, was ſtill perpetually attempted, and attempted upon arguments and principles, of which the ceremonial of the reſt of the world was wholly ignorant.

I am well aware, that with reſpect to three, at leaſt, of theſe five points; it may be objected that they were known before the eleventh century, and that therefore the epoch we have adopted has been ill choſen. If we conſider the ſubject, however, with any attention, the objection will loſe moſt of its force, when we find that although theſe cuſtoms were known, their effects had hardly been felt. The *Feudal Law*, for example, had been long known in Europe; it has been diſcovered by ſome Critics among

among the inſtitutions of *Rome*; (*a*) and it is certainly to be traced to the woods of *Germany*. It did not arrive, however, at its full growth, till about the *eleventh century*; and though it may be ſaid to have been univerſal before that period; it was not till afterwards, that it was univerſal, in all its mazes, in tyranny, and its vigour. (*b*)

In England in particular, though its outlines were familiar to the *Saxons*, it was by no means the ſame with that obſerved by the reſt of the world, till after the *Conqueſt*.

It is well known that the conſequences of the battle of *Haſtings*, were not confined to the mere change of maſters from HAROLD to WILLIAM. The laws of the land; the nobility of the realm; the manners and language; and the art and maxims of war, which prevailed among our anceſtors, underwent an alteration during the Norman reigns, and almoſt during the firſt Norman reign, the effect of which is not even yet worn out. But if this had not been the caſe; had William ſucceeded quietly to the throne; the mere circumſtance of his uniting *Normandy* with *Britain*, by which he laid the foundation for thoſe extenſive *feudal* connections on the Continent, which ſo entirely engroſſed the nation for many hundred years afterwards; would have marked the century in queſtion, as a moſt important one to this kingdom. The animoſities and friendſhips, the numerous and intricate claims, and the thouſand cauſes for war, to which that connection gave birth, will make it ever be conſidered as a very

(*a*) Blackſt. Com. 2. Chap. 4.

(*b*) See Blackſt. 2. 4. 5. Craig. J. Feud. Lyttelt. Hen. 2. 1. Roberts, Ch. V. 1. Henault. Hiſt. Chron de. Fr. rem. ſur la. 2nd race. Monteſq. E. des Loix, L. 30. paſſim. Velly Hiſt. de Fr. 1. Putter Conſt. of Germ. 1. Hume. Append. 11. to Hiſt. of Eng. takes no notice of the Chronology of the Syſtem. Pfeffel Droit pub. d'Allem. (1. 234. 288) attributes it to the *twelfth* century.

momentous

momentous æra in the hiſtory of the Law of Nations as obſerved by the *Engliſh*.

With reſpect to CHRISTIANITY, I am far from imagining that its influence on the mind was not felt long before this period; and in part it has already been touched upon. (*c*) Its *good* effects will ſtill continue to be traced; but unfortunately the effects chiefly to be deſcribed, aroſe from the *corruption*, rather than the *purity* of the Church. It will be ſufficient to remark that this was the age of GREGORY VII. the firm ſupporter, if not the founder of theſe Papal uſurpations, which amounted to a tyranny the moſt wonderful that ever ſubjugated the mind of man: That this was the age which ſaw the commencement of thoſe deſolating wars which took their riſe from zeal alone; were conducted, from miſtaken principles, in a manner ſuch as rendered the heart more ſtubborn than it really was; and ſo far, did as much miſchief to the Law in queſtion, as in other reſpects it had ſometimes done good. This alſo was the age to which ſeveral diſtinguiſhed kingdoms of Europe actually attribute their converſion (or at leaſt the extenſion of their converſion) to CHRISTIANITY; and they were therefore only now introduced to participate in thoſe effects upon the law, to the production of which, it will be ſhewn it ſo powerfully contributed. Paganiſm ſtill exiſted in many parts of *Denmark*, *Sweden* and *Norway*, and in almoſt the whole of *Pruſſia* and *Muſcovy*. (*d*)

With reſpect to CHIVALRY, it is acknowledged that its foundation was laid in this century; and as for the CEREMONIAL of Europe, it ſeemed unknown till long afterwards; and although the cuſtom of making *Treaties* had been from old time in uſe; yet

(*c*) Chap. VIII. ad fin.

(*d*) Puffend. de reb. Succ. the reign of Ingo. and Introd. à l'Hiſt. Univ. 5. Chs. 1, 2. Mod. Un. Hiſt. 28. 460. 29. 411.

their effect upon the politics and public maxims of the world before this æra, it would be difficult to discover, if they ever had been felt.

It is, therefore with more propriety than at firſt it may appear, that I have reſerved the conſideration of the impreſſions made upon the Law of Nations by the five circumſtances above mentioned, for the æra I have fixed upon. At the ſame time it may not be unneceſſary to premiſe, that in the following inveſtigations, ſuch very ſtrict attention to any particular cuſtom has not been paid, as to confine it *exactly* within the bounds of the period propoſed. In general, whenever I have found a law, or maxim, at its height during this time, I have choſen to mention it here; but at the ſame time I claim the liberty of ſearching for its commencement in the century before it, or of purſuing it to any number of years afterwards, if afterwards it ſhould be found to exiſt.

The field is now wide before us; and without any particular reaſon for preferring it, I ſhall conſider the different points, in the order in which they have been mentioned. And firſt, therefore, of the FEUDAL SYSTEM.

CHAP.

CHAP. XII.

OF THE INFLUENCE OF THE FEUDAL SYSTEM.

IN obſerving upon the effects of this remarkable and extenſive Inſtitution, it does not fall within our plan to give any regular account of its various regulations, its general ſpirit, its diſputed points, its thouſand niceties. Such knowledge muſt be ſuppoſed to have been already obtained by thoſe who come to the preſent enquiry. To examine it would ſurpaſs the ſcope of this Treatiſe; and even if it did not, the ſubject has already received all the light which the labour, talents and judgment of the beſt heads in Europe have been able to give to it. Taking it therefore for granted, that the whole learning upon the point, is in the poſſeſſion of the reader; I ſhall proceed merely to examine its effect upon the law of nations during the centuries when it chiefly prevailed.

That effect, it muſt be owned, was not viſibly to improve mankind; there was not ſo great a difference as might be expected between the nations with whoſe cuſtoms we have been ſo much ſhocked, and thoſe of the feudal ſovereigns. The chief ſeems to have been, that the former were continually migrating; the latter had become ſtationary; the former give us the image of armies moving from plain to plain; the latter of armies intrenched in their camp: but war was equally the buſineſs and the delight of both, and both were bloody, inſolent, and rapacious.

The ſuperiority, however, which is always to be obſerved in ſtationary over wandering nations, came

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at laſt to ſhew itſelf; and the wars of the times, although not leſs frequent than before, began to be conducted on a ſort of principle and arrangement, approaching ſomewhat to a ſettled ſyſtem. The whole life of the Barbarians was paſſed in arms, and almoſt in battle; and when to die a violent death was a religious duty; it would have been almoſt abſurd to have required any cauſe for taking arms. (*a*) When government, however, came to be well eſtabliſhed throughout Europe, although little attention was for a long time paid to it, yet it became a general law to require a cauſe for hoſtility; the nature of ſovereignty began to be underſtood, and the idea of *legitimate* and *illegitimate* wars was thus by degrees adopted. On this ſituation of things, the feudal eſtabliſhments operated with conſiderable effect; and, by a minute attention to their ſpirit and genius, we ſhall diſcover a variety of points in which the intereſts and connections of nations were extended and modelled in a manner ſometimes advantageous, ſometimes the reverſe, but which, had it not been for the *feudal polity*, would never have been known.

One of the moſt obvious and general of its effects, was the great multiplication of the States of the world, and by conſequence, unhappily for mankind, the multiplication of its cauſes for war.

A large portion of the Earth, governed by one head and properly civilized under one common Juriſdiction, muſt have fewer of theſe cauſes, than the ſame portion of the Earth, divided into a number of ſtates independent of one another. In the former caſe, differences are accommodated by the peaceable mode of trial and ſentence; in the latter, the moſt trifling perſonal quarrel, and, (if the ſubdiviſions are purſued to any extent) the common diſſentions of *private* life, become the ſignals for public and ge-

(*a*) Vid. Sup. Chap. VII.

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neral hoſtilities. Where this therefore takes place, not only the manners of mankind, but their Law of Nations, muſt be conſiderably influenced; and ſuch was the effect of the Feudal Syſtem upon the earlier ages of Europe.

It is the more neceſſary to examine the point under the preſent head, ſince none but Sovereigns can make *legitimate* war; and as the Barons' wars, form a conſpicuous part in the hiſtory of theſe ages, we muſt naturally refer to that which beſtowed upon them a right ſo important.

This privilege, then, of taking arms at pleaſure, which, from the more private rank and the ſubordination of thoſe who poſſeſſed it, was known by the characteriſtic term of PRIVATE WAR, was the moſt valuable right in the eyes of an antient Baron which he poſſeſſed, and one of the laſt which he parted with. However, it was rather modified and brought into a ſhape capable of producing more energetic miſchief, than *inſtituted*, by the Feudal Law. Moſt barbarous nations are remarkable for the determination with which families and friends purſue and avenge their injuries, and this from a political, as well as a friendly motive. The antient nations of Germany, (*b*) as well as the Indians of America, preſent us every where with this cuſtom. From the former it was derived to the different nations of Europe, (*c*) and it was not only the diſpoſition, but the duty, of every family to avenge the loſs of any of its members upon the family which had cauſed it. The hoſtilities which aroſe in conſequence, were called FAIDÆ (*d*), FEID, or FEUD;

(*b*) Suſcipere tam inimicitias ſeu patris, ſeu propinqui quam amicitias neceſſe eſt.—Tacit. de mor. Germ. C. 21.

(*c*) It continued among them ſix hundred years.
Henault. Hiſt. Chron. de Fr. rem. ſur la 2nde race.

(*d*) Spelm. Gloſs. voc. Faida.
Du Cange. Diſſertation 29 ſur Joinville, p. 330.

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(*e*) the Laws of moſt of the weſtern countries not only let them paſs unpuniſhed, but, by regulating, gave them authority; and ſo high was this duty carried, that in many places, whoever ſucceeded to an Eſtate, ſucceeded to the vengeance due for the death of the laſt who had poſſeſſed it. (*f*)

As the notions of juſtice, however, improved, attempts were made to curtail, and by degrees to abrogate this pernicious right; (*g*) but their ſucceſs was comparatively ſmall; and when, through the weakneſs of the Carlovingian Monarchs in France; (*h*) the diſorders of the Heptarchy in England; and of the elective Government in Germany; (*i*) the power of Corporations in Italy: and the community of territory which was left in Spain, for every one who could conquer it from the Moors; when, through theſe cauſes, the independence of every Lord who owned a fortreſs, or could maintain a man in arms, was firmly eſtabliſhed; the FAIDA was eagerly adopted, and extended into the right of Private War, by all the Barons throughout Europe. (*k*)

(*e*) Hence the phraſe ſtill in uſe, of "Deadly Feud," to expreſs the extremity of hate between perſons or families.

Stewart's V. of Soc. 250.

(*f*) Ad quemcunque hæreditas pervenerit, ad illum *Ultio Proximi*, &c. debet pertinere.

Leg. Angl. & Werinor. ap. Lindenb. tit. 6.

(*g*) In England, ſo early as the time of King Edmund. Ar. 941.

L. L. Edm. ap. Spelm. Gloſſ. et Wilkins. Leg. Sax.

(*h*) Monteſq. & Henault. ub. ſup.

(*i*) Pfeffel. Droit. pub. d'Allemagne abreg. & Putter. from the reign of Arnolph to Hen. V.

(*k*) With deference to that learned writer, this ſeems a more probable account of the riſe of Private War among the Feudal Barons, than that adopted by Profeſſor Putter, (Conſtitut. of Germ. tranſl. by Dornford. B. 1. C. 7.) who contents himſelf with attributing it merely to the uſurpation and pride of the Barons in the moments of weakneſs in their Kings. This, as has been obſerved, might have foſtered and regulated it; but it ſurely was originally nothing more than a continuation of the FAIDÆ, which had long been legal, and were never entirely ſuppreſſed.

A new

A new picture thus opens itself before us; the western world was not only divided into a variety of independent nations, governed in their intercourse by certain general customs; but each of them again was subdivided into subordinate States, acknowledging indeed some one LORD PARAMOUNT; but all of them equally independent of one another, with the greater Kings of the Earth. France, Germany, Britain, Italy and Spain, were carved out, as it were, among the Lords of innumerable Castles, (*l*) who made War and Treaties with all the vigour and all the ceremonies of powerful Monarchs.

The Corps Diplomatiques are full of these Treaties, in which nothing can be distinguished in the intercourse of these subordinate Vassals, from that of independent Kings, except when mention is made of the rights of *Lord Paramount*. Stewart and Lyttelton have thought it worth while to preserve several of them in their Appendixes; and a serious attention to them will sufficiently refute a marked expression of a writer whose very high authority would have possibly stopped me from proceeding in these

(*l*) Nothing can bring this more forcibly to our observation, than the bare recital of the number of Castles and Fortresses possessed by the Barons of various Kingdoms. In England, at the peace between Henry II. and Stephen, *eleven hundred and fifteen* Castles were ordered to be destroyed.—Lyttelt. H. II. 1. 418.——In France, upon a negociation for peace between Edw. III. and Ch. V. in the year 1376, the Plenary Power of the French Ambassador contained a state of the fortified places they were willing to give up to Edward. They amounted to the astonishing number of *fourteen hundred* walled Towns, and *three thousand* Fortresses, in the *province of Aquitaine alone*.

Villaret. Hist. de Fr. 2. 491.

When we consider that these were not entertained for the public defence against foreign enemies, but chiefly for that protection which is now afforded by the Laws, without the assistance of a single Garrison, how much reason have we to rejoice in the changes of the times!

considerations,

conſiderations, had he not thrown it out as a mere *obtier dictum*. *Du Cange*, after detailing the laws which governed the cuſtom of private war, and obſerving that *the right was univerſal among all the Weſtern States*, obſerves, " Cependant cette faculte de " ſe faire ainſi la guerre, *eſt contraire au Droit des* " *Gens*, qui ne ſouffre pas qu'aucune, autre ait le pou- " voir de declarer et de faire la guerre, que les " *Princes* et les *Souverains*, qui ne reconnoiſſent per- " ſonne au deſſus d'eux." (*m*)

In this obſervation, the ſubject of the law of nations was not regularly before *Du Cange*; or, if he had really conſidered it, he neither had taken the view of it which I have done, in conſidering it a particular law, confined by cuſtom to particular nations; nor had he actually conſidered the whole nature of Sovereignty, which has a variety of modifications that allow a feudal Vaſſal to be fully Sovereign *quoad* the right of making peace and war, with all but his Lord Paramount.

It is true that Charlemagne had denied them this rank, even as it related to the right of making war; and the following Capitulary tends to ſupport the opinion of PUTTER reſpecting the origin of that right: (*n*)

" Neſcimus qua pernoxia inventione a nonnullis " uſurpatum eſt, ut hi qui nullo miniſterio publico " fulciuntur, propter ſua odia et diverſiſſimas vo- " luntates peſſimas, indebitum ſibi uſurpant in vin- " dicandis proximis et interficiendis hominibus vin- " dictæ miniſterium: et quod Rex ſaltem in uno ex- " ercere debuerat propter terrorem multorum, ipſi " impudenter in multis perpetrare non metuunt prop- " ter, privatum odium." (*o*)

(*m*) Diſſertat. 22. ſur Joinville. p. 342.
(*n*) Vide note k, page 343.
(*o*) Capit. carolomag. L. 5. 180.

But although, during the time of CHARLEMAGNE, the privilege might have been thought an uſurpation; yet, during the ſucceeding ages, when the feudal ſyſtem had become what it is generally conſidered, and had aſſumed that regularity of ſhape which it continued to wear ſo long; the vaſſals were men of very ſuperior conſequence to that which they had before enjoyed; and, as far as it relates to the right of war *with one another*, were not to be diſtinguiſhed from States the moſt independent. Hence therefore, when PHILIP AUGUSTUS propoſed to RICH. I. in a treaty of peace, that their barons ſhould be prevented from making war upon one another; it was refuſed by Richard, "Quia videlicet violare nolebat *Conſuetudine* & *Leges* PICTAVIÆ vel aliarum terrarum ſuarum, in quibus conſuetum erat ab antiquo, ut *Magnates, cauſas proprias invicem allegarent.* (*p*)

There was this difference, however, between independent States and the ſubordinate Sovereigns; that the former had no common Tribunal to appeal to, and could only decide by the ſword, while the latter, on the contrary, could appeal, *if they pleaſed*, to their Lord Paramount; and things were then decided by the judgment of their Peers. Their public maxims alſo among one another would, no doubt, take their character from the general Laws of their particular Nation; and as Europe conſiſted of a certain claſs of Nations, inſulated with reſpect to the reſt of the world; ſo the petty Sovereigns that compoſed any particular State, may be ſaid to have formed a diſtinct claſs, with reſpect to the reſt of Europe.

The accurate *Beaumanoir*, and the elaborate *Du Cange*, have detailed the particular cuſtoms attendant upon the private wars of the French Barons, in a manner that throws great light upon the ſubject;

(*p*) Hovedon. P. 741.

and

and they will be our guides in much that we ſhall have occaſion to obſerve relating to them. And firſt, with reſpect to the cauſes for War.

Theſe could only be ſuch crimes as would have been puniſhed with death had the injured party appealed to the civil tribunals, what *Beaumanoir* calls "Vilains meſaits," and were always ſome flagrant breach of the Law, as Murder, Adultery, or Treaſon. (*q*)

When any of theſe crimes had been perpetrated, war was inſtantly made by the family injured againſt that which had done the injury; for on theſe occaſions they were governed by the ſpirit of the old FAIDÆ. All the relations, therefore, of the injured perſon were bound to join themſelves to his ſtandard; and every one of them not only had a right, but was under obligation to attack the poſſeſſions and the perſons of every one of the hoſtile family. The obligation indeed was ſo ſtrong, that, upon a refuſal to comply, men were actually obliged to renounce their relationſhip, and with it all their rights of ſucceſſion to family property, in a ſolemn and public manner, often taken notice of by the Salic Laws. (*r*)

But as Relationſhip was thus made to confer the moſt important rights, and to ſubject a perſon to very cruel duties, it became neceſſary to define with accuracy how far it ſhould extend, ſo as to be brought within the meaning of the Law: it was determined at firſt, that beyond the ſeventh degree of affinity, and afterwards, beyond the fourth, where the Laws of the Church permitted marriages to commence, any one who choſe to ſtand neuter, was not bound

(*q*) Contumes de Beauvais. par Beaumanoir. Ch. 59.—Du Cange. Diſſert. ſur la vie de St. Louis. par Joinville. 29.

(*r*) Velly Hiſt. de Fr. 3. 115. Henault ub. ſup. & tit. 63 of the Leg. Sal.

to take part with his family. If therefore, prompted by affection, or a warlike ſpirit, he ſtill choſe to fly to arms, he was then conſidered as a principal, and as ſuch, was obliged alſo to declare war in form; (*s*) ſo that it ſhould ſeem, thoſe who were within the degrees of affinity were not bound to comply with this ceremony after it had once been gone through, by the perſon who acted as principal. (*t*)

Such principal was called "CHEVETAIGNE," or "QUIEVETAINE," evidently the radix of the Engliſh word CHIEFTAIN, and ſignified a perſon who, to revenge an injury done to his family, declared war againſt the offender. (*u*) The forms of that declaration were ſolemn and worthy of imitation; they admitted alſo of ſo many modifications, that a thorough knowledge of them muſt have conſtituted no inconſiderable part of the juriſprudence of the times. They ſeem, however, to have been arranged under the two diviſions of DEEDS and WORDS.

War was declared by DEED, when it aroſe on the ſudden, "*Quant caudes mellees ſourdent entre Gentix-*"*hommes d'une part et d'autre*; (*x*) and in this caſe, all thoſe who were preſent, were obliged to take part in it, according to the ſide to which they were attached. (*y*) It was declared by WORDS when the principals ſent defiances to one another. "*Quant* "*li un manece l'autre a fere villonie, ou an jude de ſon* "*cors.*" There was, however, a very material diſtinction between the conduct of the Relations, and that of the Principals; for the latter, being ſuppoſed to underſtand one another's cauſes for complaint,

(*s*) Du Cange. ut ſup.

(*t*) Coutum. de Beauv. C. 59. Du Cange. Diſſert. 29. ſur Joinville p. 333. Theſe are circumſtances ſufficiently remarkable, but which either eſcaped the notice, or did not fall within the ſubject, of Dr. Robertſon, Introduct. to Ch. 5.

(*u*) Beauman. Ib. (*x*) Ib. Id.

(*y*) Du Cange. 333.

might

might enter upon the war immediately after the declaration; while the former who might live at a diſtance, or might not be acquainted with the procedure, were allowed forty days to prepare themſelves, unleſs they happened to be actually on the ſpot when the quarrel broke out; and this regulation was made by PHILIP and HARDY, according to Beaumanoir, (or Saint Lewis, according to Du-Cange), (*z*) as the means of aboliſhing by degrees the whole of the practice in queſtion. In Germany alſo, by what was called the *Landfriede*, or *Peace* of the Empire, (a regulation of Frederick I. confirmed by the GOLDEN BULL,) a Baron going to war, was obliged to declare himſelf an enemy, and give three days notice to his adverſary. (*a*)

From this duty in the family to make common cauſe, it followed, that if two Brothers made war upon one another, the Law by which they were bound to aſſiſt could not take place, the family being equally related to them both, a caſe which was altered if the Brothers were only uterine. (*b*)

It is needleſs to obſerve, while treating the effects of the Feudal Syſtem, that all the *Vaſſals* of the Lord ſupported him in the war. What, however, was rather remarkable, and can only be explained by the peculiar nature of that ſyſtem, they could not be attacked except while in arms, and on actual duty. As ſoon as they had returned home, upon the concluſion of their campaign, though the war might continue between the principals, they ceaſed to be parties; having barely performed the regular ſervice required of them by the Feudal Law. (*c*)

(*z*) Du Cange 334.

(*a*) Putter. L. 2. C. 10. Golden Bull. Ch. 17. De Diffidationibus. ap Du Mont.

(*b*) Baum. ut ſup. Du Cange. p. 333.

(*c*) Beaumanoir, Ch. 59. It is extraordinary that Dr. Robertſon, whoſe accuracy and obſervation upon this ſubject no one can

The rights of the Individuals of the family were no leſs important when the difference came to be terminated, than they had been on the breaking out of the war. They were all to be conſulted, and all of them had a right to put a negative on the negotiation. This negative, however, was not binding upon thoſe who were tired of the quarrel, and were willing to make peace; and in that caſe therefore the perſons concerned aſſumed new ſituations. He, who perhaps had been the original QUIEVETAINE, retired from the war; and he, who had only engaged as auxiliary, was left as principal; nor were any of his family, not even the perſon whoſe injury had been the cauſe of the feud, bound to aſſiſt him. But that it might be underſtood what was the preciſe ſituation of the parties, new declarations were to be made, in which it was known who were to be conſidered as friends, and who were to remain as enemies; and if without ſuch declaration any act of hoſtility was committed, the perpetrator was guilty of a kind of treaſon, (*paix briſée*) and might be puniſhed with a halter. (*d*)

There were three modes of terminating theſe differences, according as the parties could agree.—I. By making a regular treaty of peace.—II. By taking

can queſtion, with Beaumanoir before him, has alſo neglected this circumſtance, the importance of which as to the Law of Nations muſt be evident.

(*d*) Beauman. Pa. 301, et infra. The Preſident Henault ſeems to have loſt ſight of his uſual accuracy in throwing the rights of Private War and of the Duel together. Immediately after deſcanting upon the miſchiefs of private war, he ſays, "Cependant "ces combats eurent beſoin depuis de la permiſſion expreſſe du "Prince; en ſorte que c'etoit une crime de leze majeſté de ſe "donner Camp et Jour," &c, (Rem ſur la 2nde race.)

This and what follows evidently have reference to the Laws of Single Combat, which was a mode of legal trial, and had no connection with the right of Private War, a right enjoyed as a privilege of the Fief, and in ſpite of the authority of the Sovereign.

bonds of aſſurance from one another, to ſuſpend hoſtilities, and abide the deciſion of a ſuperior Lord.—III. By ſingle combat.

The firſt, as it was not peculiar to the *Feudal Syſtem*, need not be taken notice of here. By the ſecond, either party, (and generally, as was natural, that which was the weakeſt) might ſummon his adverſary to the Lord's Court, and oblige him to give bond that he would not moleſt him farther, either in his perſon, in his family, or his goods, but bring the difference regularly before the Juriſdiction of the Court. In order to underſtand this the better, it muſt be remembered, that although two Barons, having the right of war, might, and generally did, fly to arms upon every quarrel, yet this did not deſtroy the power of civil tribunals. Though much neglected, they were ſtill open, and when appealed to, did juſtice in the manner they beſt were able. None, however, but the Courts which poſſeſſed the privilege of what was called the HIGH JUSTICE, in other words, the power of life and death, could take cognizance of theſe diſputes; the reaſon for which will be obvious when it is recollected that none but crimes which in the event of conviction could be puniſhed capitally, were the fair and legal cauſes for war during that time. (*e*) We may imagine, however, the little efficacy of this mode of terminating differences, when the ſtrongeſt party was often ſuperior, not only to his adverſary, but to

(*e*) Vide ſupra. Dr. Robertſon, in his Note X, Sec. 1. Introd. to Ch. 5. in which abundance of learning is diſplayed, has been ſomewhat inaccurate, or rather not ample enough in his account of this matter. He contents himſelf with ſaying that Bonds were granted voluntarily, or exacted by the Magiſtrate, to abſtain from hoſtilities, and that afterwards, if any were committed, the penalty of Treaſon was incurred. He makes no mention at all *of the trial of the original difference before the Civil Courts*, the very cauſe, probably, why it ſhould then be conſidered as Treaſon.

the

the judge himſelf; for it depended upon the accidents of power and firmneſs in the Lord, whether ſubſtantial juſtice could ever be done. So late as the year 1224, Fowkes de Breaute, having thirty-five verdicts of diſſeiſin paſt againſt him, ſet the King's Judges themſelves at defiance, and *nimis inconſulte agens*, to uſe Matthew Paris' expreſſion, bound them in chains, threw them into Bedford Caſtle, and confined them in the Dungeon; nor could he be puniſhed according to his merits; for though his Brothers and others who aſſiſted him, to the number of twenty-four, were hanged, he himſelf eſcaped with the milder puniſhment of exile. (*f*)

The third mode of terminating a private war, was by DUEL, the nature of which is too well known to need any particular diſcuſſion. We may obſerve, however, that although *Beaumanoir* has conſidered it as a ſeperate mode, it rather ſeems to have been the conſequence of the laſt, namely the Appeal of the Lord's Court; the Reader not being to be told, that even before the regular Juriſdiction, the DUEL was often the very mode of the trial.

Such is the account of the maxims of private war, as it prevailed among the Barons of France; and which, according to the Syſtem we purſue, may be not unreaſonably conſidered as a part of the Law of Nations in this time.

But *France*, the faireſt, and moſt extenſive country of the Chriſtian World; the Parent of ſo many Colonies, and even of ſo many Kingdoms, (*g*) could not fail to have much influence upon the maxims and manners of other Nations, and it may therefore be not unfairly ſuppoſed, that much of the genius and

(*f*) M. Par. 320.

(*g*) Of Sicily, of Naples, of Jeruſalem, of Flanders, at one time of the whole Greek Empire, and in ſome meaſure of England. See the Hiſtories.

ſpirit

ſpirit of theſe Laws, pervaded the Feudal Polity in other parts of Europe.

In *Germany*, private war raged with univerſal violence; and from the elective conſtitution of the Empire, the conſequent weakneſs of the Government, and the circumſtance that the Papal thunders were firſt directed into that quarter, no efforts of the Sovereign could put an end to it till the very end of the fifteenth century, when the erection and firm ſupport of the Imperial Chamber, habituated men to a more regular courſe of Juſtice. (*h*) Even ſo late as the beginning of the fourteenth century, the diſorders of that country roſe to ſuch a height, that ſixty cities of the Rhine, together with the three Eccleſiaſtical Electors, the Prince Palatine, and the Duke of Bavaria, were obliged to aſſociate together to defend themſelves againſt the Protectors and Relations of Robbers, on the highway, *who might uſe their right of war to avenge their deaths.* (*i*) Among other cauſes for this, there is perhaps none ſtronger, or which demonſtrates the vices of an elective Government with greater force, than the little intereſt which the Emperors themſelves had to ſupport the ſupreme authority. As they knew that every advance to good order would weaken the power of their families, in caſe they did not ſucceed to the throne, they were the leſs concerned to attempt, what all the other crowned heads in Europe were perpetually endeavouring to effectuate. Hence the ſtrong circumſtance, that the Princes of the empire, who were originally nothing more than the other Barons of Europe, have continued *Sovereigns* to this

(*h*) Pfeffel. ſub. ann. 1495.

(*i*) Heiſſ. 1. 152. Pfeffel. 1. 416. the Deed is in Du Mont. Corps. Dip. 1.

day

day, and may exerciſe the ſame right of war in common with all other Sovereigns. (*k*)

In *Italy*, which was at a ſtill greater diſtance from the ſeat of Government, the Emperor loſt his power ſooner. The original Vaſſals of CHARLEMAGNE and OTHO, not only aſſerted the privilege of private war as a *feudal* right, but became, and are ſtill, more independent of their Chief, than their fellow Sovereigns of Germany; and this was one of the reaſons why the Kings of France allowed them to clothe their foreign miniſters with the full repreſentative character of *Ambaſſador*, which they often denied to the Electors. (*l*)

In *Spain*, where revenge is almoſt a point of honour, and forms part of the national character, the right in queſtion may be ſuppoſed to have been carried to its height; and its abolition was alſo proportionably later; the regulations for this purpoſe having been ineffectual till the time of CHARLES V. in the year 1519. (*m*)

The hiſtory of the *northern* kingdoms, is for many a century the hiſtory of anarchy and murder; and private war flouriſhed there but too long. In *Sweden*, it is remarkable, that it was the clergy who laſt poſſeſſed the means of it, and ſo late as the reign of GUSTAVUS ERICSEN, an act of the ſtates was neceſſary to veſt in the King the poſſeſſion of their numerous caſtles. (*n*)

(*k*) Even the Lanfriede, or Public Peace, a fundamental conſtitution of the Emperor Frederick I. for the preſervation of the tranquillity of the Empire; while it threatened Robbers and Incendiaries with the Ban, reſerved to every one a right to do juſtice to himſelf, provided he gave three days notice to his Adverſary.

Putter. B. 2. Ch. 10. Vide Sup.

(*l*) See Wicquefort de l'Ambaſſad.

(*m*) Robertſon. Introd. Ch. V. Note X.

(*n*) Mod. Un. Hiſt. 29. 378. Erickſon died in 1566.

But of all the Nations of Europe, perhaps without the exception of *Poland*, this remarkable right exiſted longeſt in the northern parts of *Great Britain*. A HIGHLAND CHIEF was always formidable, even to his Sovereign, as well as to his neighbours, and his power and name have been dreaded in the extremity of the ſouth.—Nor was it till late in the preſent century, and that in conſequence of the influence of the Pretender in *Scotland*, that they received their final blow. The ſeverity and language of the different acts that have paſſed againſt them, beſpeak in ſtrong terms, the manners and cuſtoms of this warlike people. (*o*)

In this univerſality of independence in the Barons of Europe, we may imagine that the Engliſh were not without their ſhare; and accordingly the right in queſtion was tranſmitted to them from the Saxons, and but too often exerciſed. They maintained courts of their own, and officers whoſe characters beſpoke the parade of royalty under the names of Conſtable, Mareſchal, Juſticiary, Seneſchal, and Chancellor. (*p*)

The families of Northumberland, Glouceſter, Warrenne, and Warwick, are illuſtrious for this ſort of power, and of the latter, he who was known by the name of King Maker, was alone ſuppoſed to ſupport 30,000 retainers at his different manors and caſtles.—We have a further ſtrong inſtance of his

(*o*) By 1 Geo. I. Cap. 56. the being found poſſeſſed of arms in the Highlands, for the ſecond offence was puniſhed with ſeven years tranſportation; and only men of 400 pounds Scots, revenue, could keep *two* firelocks. Nothing is more characteriſtic of the ſpirit of private war than the inſcription mentioned by Johnſon, (Tour to the Hebrid. the account of Col.) upon an old caſtle in Scotland. "If any man of the Clan of Maclonich ſhall "appear before this caſtle, though he come at midnight, with a "man's head in his hand, he ſhall there find ſafety and protecti-"on againſt *all but the King*.

(*p*) Hume's Appendix II.

power,

power, and the ſpirit of ſovereignty aſſumed by the feudal Lords, in the memoirs of Commines. WARWICK was governor of Calais, and the town ſeemed little to conſider who poſſeſſed the throne of England, but rather looked to him as their Sovereign. When, therefore, Commines was ſent there from the Duke of Burgundy, he found the whole Garriſon in his Livery, and as a compliment had the apartment aſſigned for him, decorated with white croſſes, (the arms of France) and rhimes, importing that *the King of France and the Earl of Warwick were good friends.* (*q*)

Dr. Robertſon, however, obſerves, that the mention of private war, in England, is more rare than in other countries; (*r*) poſſibly owing to the cauſe he aſſigns of the ſuperior vigour of the Norman Kings. The fact is certain, that though many of the Barons roſe to a great height of power, there were in England none of thoſe immenſe fiefs which in France, Germany, and Italy, ſplit the monarchy into fragments, (*s*) nor was the unwiſe policy purſued, which divides the faireſt portions of the kingdom into Apanages for the children of the blood royal, a meaſure ſo long deſtructive to the intereſt of other countries. (*t*)

We find then the right of *private war* univerſal throughout Europe, during the height of the Feudal Syſtem; nor were Eccleſiaſtics leſs eminent for the exerciſe of it than the Laity. The Clergy were poſ-

(*q*) Commines, L. 3. Ch. 6.

(*r*) Note X. Introd. to Ch. 5.

(*s*) Henry, the Lion of Saxony, extended his territories from the Adriatic to the Baltic, and poſſeſſed Saxony, Bavaria, and Weſtphalia. Heneault 1180. Puffend. Introd. 3. 271. Putter. 2. 10.

The great fiefs of *Normandy*, *Acquitaine*, *Bretagne*, and above all, *Burgundy*, were able at any time to ſhake the whole monarchy of France.

(*t*) Lancaſter and Cheſter were the only counties Palatine which emanated from the crown, and were very quickly reſumed.

ſeſſed

ſeſſed of Baronies in right of their Churches, and were often perſonally engaged in the duties which they impoſed. (*u*) As the ſacred character, however, exempted them, if they pleaſed, and at any rate was inconſiſtent with a martial one, even in a martial age, the officer charged with the management of their temporalities, ſucceeded to this part of them alſo, and was called VIDEME, or VICE DOMINUS. Like the Viſcount, he ſoon converted his office into a fee, and by becoming the vaſſal of the Biſhop, or Monaſtery, exerciſed the right in his own name. (*v*)

Having thus given ſomewhat at large the hiſtory of private war, modified by the Feudal Syſtem, as part of the Law of Nations during the earlier periods, it would not be at all irrelevant to our ſubject, if we went as largely into the means by which the cuſtom was abrogated; and as every work ſhould be as

(*u*) The Biſhop of Beauvais was taken in arms by Richard I. of England. Upon being claimed by the Pope, the King ſent his Holineſs the bloody Coat of Mail of the Prelate, and replied in the language of Jacob's ſons, "This have we found. Know "now whether it be thy ſon's coat or no." Upon which the Pope is ſaid to have anſwered, that as he was rather the ſoldier of Mars than the ſervant of Chriſt, he ſhould be conſidered as ſuch, and ranſomed at the King's will. Holinſhed. R. 1.

The Biſhop of Cambray again, on the other ſide was taken by Philip Auguſtus, and the two Prelates regularly exchanged.

(*v*) Hence Vidame became a ſeignory or lordſhip, and was very little attributed to ſeveral French noblemen; as the Vidames of Chartres, of Amiens, &c. who held their lands of the Biſhops of thoſe places. See Paſquier Recherches de la France, 8. 5. Lu Conge. voc. Advocatus. Du Mont. 1. 93. & Diſſert. 24. ſur Joinville p. 331.

The famous Thomas a Beckett, when Arch Deacon of Canterbury, followed Hen. the II. in an expedition to Tholouſe, and maintained, at his own charge, 4000 Stipendiary Soldiers, and 1200 Knights, the latter of whom dined every day at his own table.

Lyttlet. Hen. II. 2. 161.

complete

complete within itſelf as poſſible, we might be juſtified in laying it before the reader.

As however many of thoſe means took their riſe from the influence of *Chriſtianity*, which we intend to treat of ſeperately, and as the outlines of them have already been traced with much ability by Dr. Robertſon, we ſhall content ourſelves with referring to him, (*x*) and reſerve what we have to ſay upon it for another chapter.

The next great feature of the Law of Nations which the Feudal Syſtem produced, is that remarkable and intimate connection; that conſtant pretence and indeed, *right* to interfere with one another, which the ſtates of Europe mutually aſſumed in conſequence of the diviſions and ſubdiviſions into which they had fallen. The creation of Fiefs and Arriere Fiefs, over almoſt all the Weſtern countries, preſents to us a picture of a few Lords Paramount, of ſmall real power, but great pretenſions; pretenſions which were multiplied, and whoſe intricacy and miſchiefs were infinitely extended, when the larger fiefs came to be portioned out, as they were, into ten thouſand petty Sovereignties, ſubordinate to mediate, as well as immediate Lords. By this well known, but intricate ſyſtem, there was ſcarce a ſtate then in exiſtence, which could take any public meaſure, without more or leſs involving the right and intereſt of ſome other ſtate, of which, without this ſyſtem, it would have been wholly independent.—The common rights of mankind were invaded by it, and perſons poſſeſſing particular countries, even though by a royal title, could not acquire certain other countries at the ſame

(*x*) Note X. Introd. to Ch. V.

time,

time, without a breach of Law. It was thus that, from the time of the Emperor FREDERICK the Second, who, as King of Sicily, became the Vaſſal of the Pope, no King of that country was allowed to aſpire to the Empire; or, if he did, he was obliged to renounce his kingdom; (*y*) a conſtitution which three centuries afterwards was forcibly pleaded by Francis I. of France, againſt Charles V. in their celebrated conteſt for the imperial dignity, in which perhaps we may diſcover the firſt traces of that famous European ſyſtem, called the Balance of Power. (*z*) We have ſeen the ſame ſort of renunciations in modern times, but they have been by expreſs conventions, and in the ſpirit of that remarkable policy; theſe conſtitutions, on the other hand, formed a fundamental law of the two countries, and were rather in the ſpirit of the *feudal* cuſtoms, which authorized the Pope, the ſuperior Lord of Sicily, to prevent his hereditary enemy, the Emperor, from aggrandizing himſelf in countries ſo near him.

A vaſſal could not even marry without the conſent of his Lord, leſt the inheritance might that way paſs to his enemy, of which, among a variety of examples, there is an eminent one furniſhed by the reign of Saint Lewis. The Count of *Ponthieu* had agreed to marry the eldeſt of his four daughters, and his principal heireſs, to HENRY III. of England; the parties had been betrothed, the young Counteſs had already been eſpouſed by proxy, by the Biſhop of Carliſle, and the Pope himſelf had guarantied the alliance. But notwithſtanding the affair had gone ſuch lengths, the King of France, as ſuperior Lord of *Ponthieu*, interfered upon the ground of the *feudal* law, and ſpoke in ſo high a tone (*a*) that neither his vaſſal, nor Henry, thought proper to go through

(*y*) Burigny Hiſt. de Sicile 2. 25.
(*z*) Guicciard. ſub. an. 1519.
(*a*) Velly. 2. 348.

with

with the treaty. Upon the ſame principles it was fairly imputed as a cauſe of complaint to Charles, the laſt Duke of *Burgundy*, that he had married the ſiſter of the King of England, the enemy of France, of which he held. (*b*) When we conſider the immenſe power, and the independent Sovereignty of the Duke of Burgundy, in all other reſpects, (one of the greateſt then known,) we muſt be forcibly impreſſed with the effect of ſuch cuſtoms.

It is remarkable, that there was no Monarch in Europe, who, in the earlier ages, enjoyed abſolute independence, and did not owe fealty to others, for ſome part of his dominions. For though there might be many Lords Paramount, in reſpect to the greater part of their territories, yet they mutually did homage to one another for other parts of them.—Thus, Scotland owed homage to England, for Cumberland, and Huntingdon; England to France, for Aquitaine and Normandy; France to the Pope, and the Empire, for Naples and Milan; the Emperors to the Empire, for their hereditary poſſeſſions; the King of Spain to the Pope, for Sicily and Naples; Sweden to Denmark, Denmark again to the Empire, and ſo on through an endleſs circle. The form of this homage was the moſt abject humiliation that freedom could ſubmit to; or that pride could undergo.—The poſſeſſor of a fief, let what might be his power in other parts, was bound within a year after poſſeſſion, to appear before his Lord, unarmed, ungirt, bareheaded, kneeling, and his hands held in a ſuppliant manner, *as if in the act of adoration*, between the hands of the ſuperior, who was ſeated. In this poſture he was obliged to repeat the following oath: "From this "day forth to my laſt, *I become your man*, of life, "and limb, and earthly honour; I will be true "and faithful to you and yours." (*c*)

This

(*b*) Commines.

(*c*) Novus quiſque in hæreditatem feodalem ſucceſſor, tenetur infra annum ſe domino ſiſtere, atque Inermis, Diſſinctus, Nudus Capite

This degrading ceremony was continually brought into practice, and is well deſcribed in the caſe of EDWARD III. Summoned to do homage to PHILIP of VALOIS, as Duke of Guienne, that Monarch received him at Amiens, at the head of all the nobility of France, preceded by the Kings of Bohemia, Majorca, and Navarre. As ſoon as he approached the throne, the Great Chamberlain commanded him to take off his *Crown*, his Sword, and his Spurs, and to fall upon his *knees*, on a cuſhion prepared for him; a ceremony, ſays Velly, very humiliating for a ſoul ſo proud. He obeyed, however, though it was eaſy to trace on his countenance, the marks of the diſguſt he felt, at being forced to humble himſelf ſo low before ſuch illuſtrious witneſſes. (*d*) The ceremony, had continued the ſame for above four hundred years; and we muſt not forget while on the ſubject, the famous account of ROLLO, the proud conqueror of Normandy. When Charles the Simple granted him that extenſive Dutchy to hold in fief, he was called upon, according to the practice of the times, to do homage for it. They had infinite pains to perſuade him to hold his hands within thoſe of the King; but when mention was made of falling upon his knees, and kiſſing his foot, (for ſuch was the practice at that time,) he ſwore that he would never bend his knee before any one. It was

Capite et provolutus in genua, ſupplicibus item manibus, inter ſedentis domini manus comprehenſis, eum (*velut adoraturus*) in hunc modum alloqui. "Devenio homo veſter ab hac die in poſ-"terum, de vita, de membro, et de terreno honore verus et fidelis "vobis ero, &c. &c."

From the words of this Oath, *Homo veſter*, Sir Henry Spelman derives the word Homage, and not from ΟΜΑΩ juro, as ſome Critics have done.

Spelm. Gloſs voc. Homagium.

See alſo Coke Litt. 60.

(*d*) Velly Hiſt. de Fr. 4. 393, 399.

agreed

agreed that one of his officers ſhould do it for him; and whether from aukwardneſs or deſign, in lifting up the foot to kiſs it, he overturned the Monarch, before whom the Law had thus bound him to humble himſelf. The ſtyle alſo in which ſubordinate Sovereigns were ſummoned to do this homage, was equally humiliating. They were commanded "to lay all "other affairs aſide, and be with their Lord where-"ver he might be within the country," and by any day he choſe to appoint. *(e)*

But while Sovereigns were thus fettered with reſpect to one part of their Dominions, they might be in a ſtate of the moſt abſolute freedom with reſpect to all the reſt; they might indeed, probably, be entitled to receive the ſame ſort of oaths from the very Lords to whom they themſelves had ſworn: the whole depending upon the various tenures of their various domains. It was thus that the Emperors and the Popes were for ſome time ſituated; the former doing homage to the latter for the kingdom of Sicily, and at the ſame time claiming ſuperiority over him right of the Empire. In ſuch a ſtate of things, it is obvious that there muſt have been a perpetual oppoſition of rights and pretenſions; and as the ideas of men, in thoſe days, were not the moſt perſpicuous, and the law, in its purity and ſimplicity, was ſeldom allowed to take its courſe, even in points that were well underſtood, we muſt not be ſurpriſed to find much confuſion in the daily practice of the times. Accordingly, though it often might happen that rights were aſſerted, and hoſtilities commenced, by a Lord Paramount *as ſuch*, and in his own Dominions; yet if he poſſeſſed other dominions in *vaſſallage*, the diſtinction was ſeldom, if ever, admitted. Indeed as the vaſſal had ſworn to defend his Lord

(e) Rym. 2. 604.

againſt

againſt all enemies whatſoever, without referring to any particular caſe, he could not conſiſtently become his enemy himſelf, even though it ſhould be in parts where he ceaſed to be a vaſſal. At all events, even on the ſuppoſition that his own perſonal ſervice could be got over, and, that his own immediate vaſſals might follow his ſtandard, yet one part of his ſubjects might then be perpetually called upon to fight againſt another part; a ſituation of ſuch intricacy, and which demanded ſo many ſacrifices, that we muſt not wonder if the Sovereigns of that time incurred forfeitures, and were often fairly declared *Traitors*, for doing that which, in their other capacity, they were legally permitted to do. Here, therefore the niceties of the feudal law, evidently tranſferred themſelves into the Law of Nations, and began an endleſs maze of trouble and confuſion, which brought the wars of thoſe times almoſt always to a ſtate of civil war.

Examples of the above obſervations are to be found in every page of the hiſtory of the earlier ages, and perſonal conteſts and hatred among Sovereigns, the conſequence of having their paſſions thus called forth, were the natural reſult of theſe cuſtoms. To produce them were almoſt endleſs, and to the attentive reader of hiſtory, unneceſſary; thoſe, however, which may be ſelected in proof of the points touched upon, may be divided into two claſſes; namely thoſe which concern the intercourſe between ſuperior and vaſſal, on matters immediately ariſing between themſelves; and thoſe in which the ſuperior interfered, in order to do that juſtice, and afford that defence to his vaſſals, againſt one another, which he was bound to do by the ſyſtem which is the ſubject of our Commentary.

The latter claſs preſent to us the picture of a common Court, or high Tribunal, in which Sovereigns,

ſuch at leaſt as acknowledged one head, were heard, and their cauſes tried by other Sovereigns like themſelves. An admirable inſtitution! which, had it been adminiſtered, or could it have been preſerved to this day, in all its purity, would have often ſpared thoſe cruel appeals to the ſword, which have ſo frequently ſwept away thouſands from the face of the world.

As the two great kingdoms of France and England were more implicated in theſe feudal difficulties than any other, from the immenſe fiefs poſſeſſed by the latter on the continent; the caſes which might be produced, would naturally be moſt ſought for in the hiſtory of their tranſactions, even if we were not, as we are, more intereſted from birth, and the better means of information, to examine them. I ſhall, therefore, in the following examples, confine myſelf chiefly to the old ſtory of the PLANTAGENETS and CAPETIANS.

In the year of 1200, John, King of England, was declared guilty of felony and parricide, by the Parliament of France, for the murder of his nephew, Prince Arthur; his proceſs was regular and formal; he was told that whatever might be the ſentence it would be executed, and, upon default, was *convicted, attainted, condemned to death, and declared to have forfeited his lands.* (*f*)

In this, PHILIP interfered in conſequence of *appeal*; there was no quarrel between him and JOHN. The appeal, however, which brought on the war, was from others as well as from the kindred of ARTHUR.

The ſtory of that unfortunate prince is well known; the injuries of HUGUES LE BRUN are not. John

(*f*) Mat. Par. ſub. an. 1202. Velly. 2. 195.

being at Paris, was invited to the nuptials of that nobleman with Iſabel d'Angouleme, and was ſo ſtruck with her beauty, that he carried her off in the way to the church, and married her himſelf. Hugues flew to arms, together with his kindred, who were illuſtrious and powerful, but being foiled by the tyrant, they appealed to Philip, who ſummoned him before his Peers. According to the feudal law PHILIP was right; and had the natural courſe of things taken place, without alteration from other external circumſtances, it ſhould ſeem that *England* ought to have remained neuter, and ſeen its king puniſhed.—But in ſwearing allegiance, *England* had ſworn to defend him againſt all enemies, and in all caſes whatſoever, and it had no right to enquire into the juſtice of PHILIP's proceeding. Here then is an eminent effect of the feudal ſyſtem upon the Law of Nations, in furniſhing cauſes for war. The hoſtilities in which the two nations were thus involving laſted fifty-ſix years. (*ff*)

In the reign of Henry III. the viſcount of Bearn, a vaſſal of France, having a diſpute with Henry, *as Duke of Guienne*, about the property of certain Caſtles, threatens to complain of him to the king of France as his ſuperior lord.

The form of Summons to the Kings of England to do their homage, was conſtantly regulated, and Philip the Hardy, poſſeſſed ſuch power in Guienne, that he even built cities there, and of his own authority aboliſhed, at the requeſt of the Engliſh themſelves, certain cuſtoms which he conceived to be unreaſonable. (*g*)

In the year 1292 the Engliſh ſubjects of EDWARD I. quarrelling with the French in Gaſcony, war was

(*ff*) The ſtory of Hugues le Brun, is in Velly, 2. 192.
(*g*) Velly, 3. 129.

kindled between the kingdoms. *As King of England*, Edward could only be purſued in the uſual mode of hoſtility; *as Duke of Guienne*, he was cited like a common ſubject to anſwer before his Lord; and though the greateſt prince of his time in power and talents, the *Citation* was fixed on the Gates of a Town in the *Agenois*, and not appearing, his Dutchy was confiſcated. (*h*) It is remarkable alſo, that in the inſtrument of citation, he was called King of England, where he was *paramount*, and not Duke of Guienne, where he was really *Vaſſal*. (*i*)

Similar to this, is a kind of Writ directed by Lewis Huttin in 1314, to Edward II. King of England, commanding him *upon the fealty and love which he bears him;* to arreſt the Flemings his enemies wherever he could find them. (*k*) He makes uſe in particular of the word *Deſtroitz*, which it ſhould ſeem had reference to the narrow ſeas of *England* where Edward was paramount; no mention is made of *Aquitaine* where he was Vaſſal, except in the direction of the Writ, which is addreſſed to Edward, ſimply, "King of England and Duke of Aquitaine." It is true, there was an alliance between the Kings, by which enemies were mutually to be baniſhed, but the word *Fealty*, and the mandatory ſtyle of the whole Writ ſhew, that if this was not really the Law and cuſtom upon the ſubject, the ideas upon it were at leaſt much confounded.

In the courſe of the war between EDWARD I. and PHILIP, there is another circumſtance, taken notice of by the French hiſtorians, which if they are right in their notions of the cuſtoms of that time, is of conſiderable importance in the hiſtory of the

(*h*) Velly. 4. 33, 42.
(*i*) Rymer, 2 617.
(*k*) Rymer, 3. 488.

Feudal

Feudal Law of Nations.—Edward ſuffered Philip to obtain an eaſy conqueſt over Guienne, the homage for which was the cauſe of contention, in order as it is ſaid, " that if he got poſſeſſion of it again by " force of arms, he might then enter upon it in full " ſovereignty by right of Conqueſt. (*l*) Accordingly, he afterwards ſent an Embaſſy to Philip, telling him that he henceforth renounced him as his ſovereign, and held himſelf free from all homage. If this was received law, it points out the means by which vaſſals, who were themſelves powerful Lords Paramount in other places, might change their vaſſallage into full ſovereignty. The Engliſh hiſtorians relate the matter differently, and upon the peace, Philip ſtill remained Paramount of Guienne. Theſe circumſtances however do not affect the reaſoning, provided the obſervation of the French writers is to be taken for law.

About forty years afterwards, EDWARD III. lays claim to certain eſtates in Guienne. Had there been no feudal Court, he muſt have aſſerted his cauſe by force of arms; it was agreed upon however, that it ſhould be regularly brought before the parliament of France, which for that purpoſe was to conſiſt of ſix peers at leaſt. (*m*)

But nothing exemplifies the effect of the feudal Law more, than the caſe of EDWARD the BLACK PRINCE. The fortune of France and Spain had often ſunk before him; he was at the head of half the former kingdom in Fief, which was thus divided into two nations; and he was ſupported by the whole force of England; yet upon complaints made by ſome weaker vaſſals, he was ſummoned in the plentitude of his power, from *Bourdeaux* to *Paris*,

(*l*) Guillaume de Nangis. & ſee Velly's Comments. 4. 43.

(*m*) Peers of Edward, as a Vaſſal of France, Velly. Hiſt. de France, 4. 457.

to

to anſwer for the conduct *which* " *out of weakneſs of* " *counſel and want of knowledge*" he had choſen to purſue. (*n*)

In the ſame ſpirit of the law, was the celebrated CHARLES the BOLD treated above a hundred years afterwards, by Lewis the Eleventh. That monarch held an aſſembly of Notables at *Tours*, to hear complaints againſt him; and he was judged guilty of leze majeſty, attainted, and his proceſs ſent to the Parliament of Paris, who by a common Uſher of the court, ſummoned him from *Ghent*, the ſeat of an Empire equal to France itſelf. (*o*) Many of the provinces which gave Lewis this right to interfere, were held till very lately by the Houſe of Auſtria in common with the reſt of Flanders—we may imagine the ſurpriſe and indignation which ſuch a proceeding in modern times would have occaſioned.

The hiſtory of Flanders during the ages before us, contains many caſes of the ſame nature with thoſe related above, (*p*) and wherever the feudal ſuperiority of France extended itſelf, thoſe rights were perpetually exerted. In 1355, Charles the Bad, King of Navarre, *but alſo Count of Evreux*, was arreſted at Rouen, thrown into priſon, interrogated like a common criminal, and threatened with death. (*q*) If war had not exiſted at that time between France and Navarre, we may ſuppoſe that it would have been the immediate conſequence, and thus from the perpetual confuſion of authority between dependent, and independent ſtates, the one might legitimately be confiſcated, in conſequence of the quarrel of the other; the power of the laſt,

(*n*) Froiſſart, v. 1. ch. 247. (*o*) Commines, L. 3. ch. 1.
(*p*) Du Mont. Corp. diplom. univ. 1. paſſim. Leibnitz. Codex. Dip. 95.
(*q*) Froiſſart. anno. 1315.

was

was often forced into action, in conſequence of the *legal* delinquency of the firſt.

The ſpirit of theſe cuſtoms as has been obſerved, was not however, confined to France: In the conteſt with Scotland, when John Baliol conſented to do homage to EDWARD I. that monarch made him feel his dependence in a manner that would ſtartle the weakeſt crowned heads of modern times; and Rymer has preſerved no leſs than ſix ſummonſes to him to appear at Weſtminſter, in order to plead like any other ſubject in the common courts of the Realm. (*r*) In this, without entering into any unneceſſary queſtion, (which has produced ſo much animoſity between the Scotch and Engliſh writers) whether this ſuperiority was uſurped or not, it is ſufficient to obſerve, that, (his title being allowed,) he did no more than what the then Law of Nations, operated upon by the feudal Syſtem, permitted him to do; and Baliol, upon this principle, however indignant, did not refuſe to comply.

The Emperors were for ever engaged in conteſts of the ſame kind, involving the ſame train of difficulties. Henry of Luxemburg underſtood and purſued them; his interference in the affairs of almoſt every Town in Italy, was founded upon them; and the Crown of Naples was once confiſcated in full Diet, in conſequence of feudal defaults. (*s*)

At another time, the Pope who pretended to the right of homage from his crown, knew how to defend his royal vaſſal, and excommunicated and thereby effectually repulſed the attempts of the Emperor OTHO upon it, during the beginning of the reign of the famous Frederick II. (*t*) The German Conſtitution indeed at this day, is pregnant with the genius of this Law of Nations; and had the feudal

(*r*) Rym. II. 603, 605, 606, 608, 615, 616.
(*s*) Heiſs. Hiſt. de l'Empire, 1. 149, 50, 51.
(*t*) Heiſs. 2. 18. Burigny Hiſt. de Sicile, 2. 22.

polity

polity continued in all its vigour, the States of Europe would probably wear an appearance, not very unlike in its effects, that which the Germanic Alliances at this moment preſent to us.

At the ſame time that the operation of the feudal ſyſtem upon the cuſtoms of the Sovereigns of Europe, was to introduce a kind of high Court in which many cauſes of material importance were determined; the Vaſſals who thus bowed to the authority of their Superior and their Peers, poſſeſſed privileges in their turn, which often influenced the turn of public affairs. They were Judges, as well as Suitors, in the Lord's Court, and for the moſt part claimed the right of oppoſing, if they pleaſed, any alienation of his fiefs which the Lord was inclined to make. Thus, they became very important parts of the executive Government of the State, and hence it is, that in almoſt all the old Treaties of peace, the ratification of the greater Barons of the Country, was generally neceſſary, and appears in all due form together with the ſignature of the king himſelf—The ſame privilege no doubt might be, and is enjoyed in ſome countries, without any reference to the feudal ſyſtem. But this is rather the conſequence of particular conſtitutions, than of the Law of Nations; and in thoſe caſes, the particular conſtitutions muſt be ſpecified in order to come at the knowledge of the cuſtom. In the caſes before us, to ſay that the feudal ſyſtem prevailed all over Europe, is to ſay at once that theſe privileges were parts of the European Law of Nations.

There was another part of the feudal Cuſtoms, which had ſo immediate an effect upon the rights of ſtates, (and it remains indeed, in many parts, to this day,) that it would be hardly poſſible in this place to paſs it by. This was that famous right of the ſupreme Sovereign to all thoſe fiefs, whatever might be their extent or power, which were left without a head, when the reigning family failed for want of poſterity.

poſterity. In this caſe the fief reverting to the Lord, he was entitled either to reunite it to his crown, or he granted it out again to other vaſſals, by the ceremony of Inveſtiture.

No length of poſſeſſion could bar this right of the Lord, or transfer, conſiſtently with law, the power to grant the fief by will, (though ſuch power in other caſes prevailed) or to elect a new Sovereign, by the ſubordinate vaſſals. But, as may be ſuppoſed, the claſh of intereſts among contending States, was perpetual, and the intricacies of Law without end, when theſe claims were brought forward. The ſame difficulties have often attended the Chanceries and Parliaments of particular kingdoms, according to their municipal conſtitutions; but theſe, ariſing entirely from the feudal law, which was the ſame or nearly the ſame, all over the Weſtern nations; theſe ſuits, were brought forward, if I may ſo ſay, in the Chancery of Europe itſelf.

The two Kingdoms of France and Germany, being the two great powers into which the integral empire of CHARLEMAGNE branched, and from which it put forth many freſh ſhoots; the influence in queſtion was moſt felt among the kingdoms and ſtates dependent upon them. I ſhall ſelect a very few examples of it, in proof of the above obſervations.

CHARLES Count of Anjou, the famous Conqueror of Naples, in 1246, married BEATRICE, youngeſt daughter of the laſt Earl of Provence, who willed that ſhe ſhould ſucceed to the ſovereignty, before Margaret her elder ſiſter, the Queen of Saint Lewis. While that monarch lived, Margaret was forced to acquieſce in this diſpoſition. Upon his death however, ſhe prepared to aſſert what ſhe conceived to be her rights; and in this ſtate of things the Emperor RODOLPH, of HAPSBOURG, took upon himſelf to judge of the diſpute. He did this as *Lord Paramount*, the earldom of Provence being a fief of the old

old kingdom of *Arles*, which had been itſelf a fief of the Empire, and at that time reunited to it, and in conſequence of this right, he gave the inveſtiture to CHARLES. Whoever conſiders the remoteneſs of the firſt Emperors who were ſovereigns of *Provence*, and the chain by which this right of Rodolph proceeded, will have a very complete idea of the point in queſtion. *Provence* was the acquiſition of *Charlemagne* in the eight century;—his grandſon CHARLES the BOLD being Emperor, granted out the Kingdom of ARLES to BOSON, from whoſe family the Earldom paſſed by marriage to the Counts of *Barcelona*. Upon the failure of their line in the thirteenth century, the then Emperor, having all the rights that iſſued from CHARLES the Bold, exerciſed this act of ſovereignty. (*u*)

Two centuries afterwards, and in another country, upon the failure of the male line of the laſt Houſe of Burgundy in the perſon of Charles the Bold; Lewis king of France immediately ſeized upon Artois, and Burgundy, as fiefs of the Crown—the wars of France and Auſtria which have ſo long deſolated all Europe, and which at this moment ſhake it to its centre, aroſe in part from this ſource.

A more important, becauſe a more intricate example, is afforded by *Milan*—the quarrel about which was endleſs between CHARLES V. and FRANCIS I. The rights of Francis were derived to him from Lewis XII. who while duke of Orleans, had married Valentine, the laſt of the *Viſconti* family, the male line failing. The right was queſtioned merely becauſe the contract of ſucceſſion, in virtue of the marriage, had not been confirmed by the Emperor, to whom the Dutchy regularly eſcheated. Lewis however, had afterwards held it by an actual inveſtiture, which again was to convey the right to

(*u*) See Henault, Hiſt. Chron. de Fr. 1. 238.

his

his poſterity, only in the caſe of the marriage of his daughter Claude with Charles V. then duke of Auſtria; which, not having taken place, the right ſtill returned to the Emperor—and hence aroſe another cauſe of the perpetual contention between the two rivals. (*w*)

I am ſenſible that in theſe caſes, and many others that might be adduced, I may almoſt appear to be relating, what rather belongs to the JUS PUBLICUM, as founded upon particular conventions, than the general Law of Nations; but accurately ſpeaking, theſe conteſts did not ariſe in conſequence of any *particular Treaty*, or *Renunciation* between two States, but from the mere effect of the feudal Law, known all over Europe, and therefore according to us, the Law of Nations itſelf. In many other points that have been touched upon, this reaſoning muſt be alſo underſtood to apply. The Law of Nations, is the law for a particular claſs of ſtates; writers upon the ſubject ſay (and very properly) *Sovereign* States. But the ſovereignty of theſe ſtates, according to themſelves, admits of much modification; ſome being Tributary, and ſome bound by unequal alliances. In general, however, when they have been entruſted with the free adminiſtration of public affairs, and have had the power of making treaties, or the rights of war, or of embaſſy, they have uniformly, by the writers on the ſcience, been conſidered as forming part of the ſovereigns of the world.—But the feudal vaſſals, however bound to obey their Lords Paramount, in many points, were preciſely in this ſituation; and they are therefore actually claſſed among *States* in the various codes of the Law of Nations. (*x*)

(*w*) Guicciard, 1492. 1521. Heiſs. 1. 215. Note 6.

(*x*) Grot. de J. B. et P. 1, 2, 3, Mackenzie Preced. of Nat. 12. Wicquefort de l'Ambaſs. 25, 39. Vattel. 1. 41.

Indeed

Indeed whoever recollects that John, and Henry III. were Feudatories of the Pope, and performed ſervices as ſuch, (*y*) muſt either deny that thoſe Kings of England were Sovereigns; or admit that all the Barons of Europe were Sovereigns alſo. Whatever concerns them before, muſt neceſſarily be related, and the whole ſpirit of the feudal law, as it governed the intercourſe of ſuperior and vaſſal, or of vaſſals among one another, becomes alſo the ſpirit of the law of nations. In this opinion (though he has rather hinted his ſentiments, and by way of compariſon, than laid down the point at large,) I am borne out by, perhaps, the greateſt of our antiquaries.

"The King," ſays Sir Henry Spelman, divided "his territories in different ways;—Provinces to "Dukes, Counties to Earls, Caſtles and Signories "unto Barons; rendering unto him, not ex pacto, "vel condicto, (for that was but cautela ſuperabun-"dans) but of common right, *and by the law of na-"tions; for ſo I may term the feudal law then to be, in "our Weſtern orb,*) all *feudal* duties and ſervices "due, &c. &c. *though no word were ſpoken of them.*" (*z*)

Poſſibly this reaſoning may be deemed unſatisfactory by ſome; to others it may ſeem unneceſſary; but as this work may fall into the hands of perſons not led by profeſſional habits to conſider this part of the ſubject; by them it will not be thought an intruſion; and I have adjudged it the more neceſſary to diſcuſs the point, even at the hazard of being thought prolix, becauſe I would not appear from attachment to a favourite idea or ſyſtem, to introduce into a treatiſe of law, any thing not warranted by argument and fact.

(*y*) Hume, 2. 15. (*z*) Spelman of Parliaments, ab init.

END OF THE FIRST VOLUME.

particular laws governed particular communities; ſtill ſo many impediments aroſe, while thus diveſted of good general principles, from power, ambition, and even religion, (prevented as it was from its original ſimplicity,) that though a certain conduct in certain ſituations was obviouſly neceſſary, yet the reaſons for it lay buried in obſcurity, and it was rather to be hoped for than expected. (*c*) Hence ſo many caſes whoſe arguments and deciſion appeared to claſh together; hence a new doctrine upon almoſt every new ſyſtem of politics, or whenever a new character appeared in the world; hence alſo the cruelty, bigotry, want of good faith, and chicanery which were every where practiſed, and which almoſt form the characteriſtic of the ages we have reviewed. It is ſaid that our *Lord Bacon* was the firſt who perceived the imperfection of the *ſcience* of the Law of Nations, and the neceſſity there was for the happineſs of the world, that the rules which governed its conduct ſhould be reduced to fixed principles. *Albericus Gentilis* had indeed put out a book which made ſomething like the attempt, but not only it is not ſufficiently general when left to itſelf, but he cramps himſelf by ſuppoſing the Roman law to be the Law of Nations: above all, he is accuſed of reſting upon doubtful authorities, which were promulgated, not ſo much to ſettle the truth, as to flatter thoſe who conſulted them, and of leaving ſeveral very noble queſtions totally untouched. (*d*) Many of the ſame objections were to be made to *Balthazar Ayala*, to whom however, as well as to *Gentilis*, Grotius allows conſiderable merit. As for the other Juriſts who had attempted to treat of this ſubject, ſuch as *Victoria*, *Henry de Gorcum*, *Lupus*, *Aria*, and

(*c*) Artis formam ei imponere, multi antehac deſtinarunt, perfecit nemo. Grot. Prolegom. 30.

(*d*) Grot. Prolegom. 38.

various other, they, according to GROTIUS, de uberrimo argumento, pauciſſima dixerunt, and made no diſtinction between the natural or the poſitive, the divine or the civil, or the canon laws. (*e*)

This jumble indeed, which was made between very different ſorts of law, was the ſtumbling-block, according to the great father of the ſcience, of all thoſe who had hitherto attempted to treat regularly of the Law of Nations. At the ſame time it is rather remarkable, that in his ſurvey of the writers who preceded him, he makes no mention of *Suarez*, the cleareſt of all thoſe who had attempted to diſcuſs the law of nature, and the difference between it and the Law of Nations. Had he gone on to treat of the minutiæ of that latter law, the labours of Grotius might probably have been much ſhortened. The extracts of this writer of the ſixteenth century, may poſſibly be recollected by the reader in the Firſt Chapters of this work. With all theſe objections to the Doctors of the time, are we to regret or not, that the Univerſities of England had put forth nothing upon the ſubject of this intereſting ſcience?

It was in the midſt of this uncertainty about true principles, and this dearth of proper authorities, that the philoſopher of *Delft* roſe like a ſtar amid the ſurrounding darkneſs, and with an ability and happineſs peculiar to himſelf, had at once the honour of inventing and bringing his ſyſtem to perfection: For he gave to the world a Treatiſe which has ſtood the teſt of time.

During the life of this great man, a civil war had deſolated the fineſt provinces of his country, and like other civil wars which are continued to any length, had degenerated into the moſt horrible licentiouſneſs and perſonal hatred. He had beſides this, obſerved throughout the Chriſtian world, a cruelty

(*e*) Id. 37.

and

and injuſtice of which, to uſe his own words, even barbarians might be aſhamed. War was denounced upon the ſlighteſt, or without any cauſe at all, and arms once taken, all reverence for law human or divine was laid aſide; " as if," ſays he, " an edict " had been publiſhed for the commiſſion of every " ſort of crime." (*f*) With many philoſophers, this threw things into the other extreme, and the amiable and learned *Eraſmus*, a man who is deſcribed as " Pacis Eccleſiaſticæ et civilis amantiſſimus," endeavoured to prove that all wars whatſoever, were illegal under the Chriſtian Diſpenſation.

GROTIUS ſaw the diſadvantages of the two extremes, and he had well diſcerned the total want of ſcience both in antient and modern times, in the methods purſued to obtain a knowledge of the duties of Nations. He therefore reſolved to give his labours to the improvement, or rather to the invention of a code of laws, which might go to the bottom of things, and ſupply authorities where authorities were wanting, to almoſt every caſe in the conduct of nations which could happen. And eminently qualified he was for this moſt noble and beneficial of all taſks. To the ſtrongeſt mental powers, he added a learning which on almoſt every ſubject, and in every language was ſtupenduous, and ſupported it by the moſt indefatigable induſtry, a virtue incorruptible, and the pureſt zeal for Chriſtianity.

The world are perhaps indebted to the misfortunes of this wonderful man, for the Treatiſe De Jure Belli et Pacis. Having entered warmly into the theological diſputes between the *Arminians* and *Gomariſts*, which aroſe about his time, he was involved in the well known oppreſſion of the Penſionary *Barnevelt* and the Arminians, by the Prince of Orange. The Gomariſts having ſhewn much diſpoſi-

(*f*) Grot. Prolegom. 28.

tion to tumult and inſurrection, *Barneveli* procured a decree from the States by which the Magiſtrates of the different cities were permitted of their own authority to levy troops for their protection. This alarmed the Prince, who conceived that his prerogative as Captain General was thereby invaded, and having before obſerved the ſtrong oppoſition of Barnevelt to all his views of ambition, he now reſolved upon his deſtruction. He therefore diſbanded the new levies, and joining with the Gomariſts, prevailed in the end in procuring the execution of the Penſionary, and the deſtruction of his party. *Grotius*, as one of the moſt active of them, was condemned to be ſhut up for ever in ſuch priſon as the States ſhould think fit, and with this proſpect before him, he entered the fortreſs of *Louveſtien* in the year 1619.—He was here, however, allowed the uſe of his library, and the company of his wife, a woman who ſeems to have been illuſtrious for various qualities, but for none more than thoſe which peculiarly compoſe the province of female virtue. She was juſtly and eminently celebrated for reſignation, fidelity, and conjugal tenderneſs, and at the ſame time for a very noble firmneſs and addreſs. It was by the exertions of theſe qualities that ſhe procured the eſcape of her huſband. Through her means, he was carried out in a cheſt by his own guards, and ſhe remained herſelf for ſome time voluntarily expoſed to the reſentment and indignation of his enemies.—He afterwards retired to France, where at Balagni, near Senlis, the houſe of the Preſident *de Meſmes*, a man of high reputation in the law, he compoſed, in 1625, the moſt noble of his labours. (*g*)

The method which he purſued in order to produce a work, which, although coming from a private

(*g*) Vie de Grot. par Burigny, L. 2.

man,

man, ſhould have the weight of a code of laws with Princes, he has himſelf expounded to us with great clearneſs in the preface. He found it neceſſary to get at ſome certain fixed principles which ſhould be acknowledged to be ſuch by all who read them. In order to do this, he was obliged to ſurvey all the codes of morality and of general law which had ever been known: he penetrated into all the ſciences between which and his own, he could diſcover any analogy; and he examined the opinions of all great men of whatſoever claſs, from which he could extract any thing like a community of ſentiment. This, being properly arranged under its different heads, together with the vaſt additions of his own learning, and the ſupport of all that could be drawn from hiſtory by way of precedent, he ventured, with very noble ambition to imagine might be received by the world as the rule for their duty in the moſt critical predicaments. The event anſwered all his expectations!

The work of *Grotius*, therefore, has for its ſupport, all that the Philoſophers, the Poets, the Orators, and the Critics of antiquity or of modern times can furniſh. It is aided by all the lights which can be drawn from the famous civil and canon laws, cleared from its defects and the falſe gloſſes which had been put upon it by corrupt or ignorant interpreters; above all, it is finally corrected and ſtampt with authority, by the indications of the divine will, as collected from the inſpired writers of the old and new Teſtaments, from the comments of the Hebrew divines, and the authority of the fathers. (*h*)

It is not ſurpriſing that a code thus ſupported, ſhould have immediately advanced into celebrity, and put down in the end thoſe various heterogeneous compoſitions which had till then formed the rule of

(*h*) Prolegoman, 40 to 56.

conduct

conduct for nations, and occaſioned many of thoſe diſcordant arguments and caſes which we have related. The Elector Palatine, CHARLES LEWIS, was the firſt Prince who had the honour to be the real patron of the work; for although it came out dedicated to LEWIS XIII. yet it was ſtrangely neglected by that King, who gave no reward to the author. The Elector, however, ſtruck with its utility, ordered it to be taught publicly in his Univerſity of *Heidelburg*, and founded a Profeſſor's chair, for the expreſs purpoſe of teaching the *Law* of NATURE and of NATIONS. At the ſame time the envy of the Learned was almoſt equal to the merit of the writer. Parties were formed amongſt them for the attack and the defence of the code, and thoſe who defended it were ſtigmatized with the name of *Grotians*. All this was not uncommon; but what will be the ideas of thoſe who are verſed in this excellent Treatiſe, when they are told, on the authority of *Barbeyrac*, that ſuch was the prejudice againſt it, that it was ſuppoſed to be calculated to annihilate the three great principles of the Roman law, "HONESTE VIVERE; "NEMINEM LÆDERE; SUUM CUIQUE TRIBUERE." (*i*) To ſuch a height of error can prejudice and old habits carry us.

The ſound ſtrength of GROTIUS, however, ſoon overcame ſuch puny oppoſition, and he had the ſatisfaction of obſerving the progreſſive reputation of his code. It became very early the favourite ſtudy of the great GUSTAVUS, who is ſaid to have found as much pleaſure from it, as ALEXANDER found from reading the poems of HOMER, and who proved his admiration of the author, by ordering him to be called to the public employments of Sweden. In 1656, it was taught in the univerſity of *Wittemburg* as public law; and in about ſixty years from the time of

(*i*) Barbeyr. Pref. to Grot.

publication,

publication, it was univerſally eſtabliſhed in CHRISTENDOM as the true fountain-head of the EUROPEAN Law of Nations. (*k*)

We may ſuppoſe, however, that the minds of men being now called to new and important matters, did not let the ſubject paſs off without adding their labours to its elucidation. Accordingly, innumerable commentaries were written upon it with various ſucceſs, ſome of which have ariſen to authority, although the moſt of them have died away, and are forgotten. Two great works, however, have been founded upon the Treatiſe, *De Jure Belli et Pacis*, which have deſervedly attained to ſuch celebrity and weight, that we cannot finiſh our ſubject without giving a place in it to their authors. The firſt is the famous work of PUFFENDORF; the ſecond, of VATTEL.

Although GROTIUS had taken a moſt extenſive range, and endeavoured to ſearch the duties of nations in war and peace to the bottom; yet the lovers of abſtract reaſoning, independent of particular application, found that there was ſomething wanting to the perfection of his ſcience. He had entitled his work, *The Laws of War and Peace*, in order, ſays *Barbeyrac*, (*l*) to engage the attention of Stateſmen and Generals, whom it moſt concerned to underſtand them. He was forced, therefore, to plunge at once into his ſubject; and although, as he goes along, he ſatisfies his readers as to the reaſons for their duty, yet it is by arguments taken up as it were pro re nata, the elements of which are ſuppoſed to be already underſtood; or if elementary principles are neceſſary for the elucidation of the point before him, a long diſcuſſion branches out from the immediate ſubject, which we feel would be better diſpoſed of ſomewhere elſe: in the ſame manner as if, in proving a propoſition of *Euclid*, we had not gone over the preliminary

(*k*) Ib. (*l*) Barbeyr. Pref. to Grot.

propoſitions

propoſitions on which it was founded, but were obliged to ſtop in the middle of it, to prove the fundamental poſition.

It was to remedy this defect *in method*, that *Puffendorf*, many years after *Grotius*, took up the ſubject anew; and, beginning with the ſyſtem of human nature, endeavoured to analyſe the heart and mind of man as independent of ſociety, before he came to enquire into his duties as a citizen. The whole, therefore, of what is called MORAL PHILOSOPHY, was ſet forth in detail by this great writer, as a proper ſupplement to what was wanting in GROTIUS, and as the true foundation of the public duties of nations.

Theſe two works together, formed for a long time, and form ſtill, the ſources to which all Stateſmen and Moraliſts muſt look for the reſolution of difficulties, and the direction of virtue. They are, however, not totally without objection, although the objection is applicable more to their manner than their matter; more to the accidents of time and place, than to their intrinſic worth. In the firſt place, they ſeem to labour too much under the heavineſs of form, which characteriſes moſt forenſic treatiſes. Their ſpeculations are, beſides, loaded ſo much with quotations, that they are abſolutely weighed down by them, and the progreſs of the reader to the end propoſed, is inconceivably impeded. Not to mention that the work of *Puffendorf*, although it ſupplies the method which was wanting in *Grotius*, poſſeſſes not, perhaps, that brief perſpicuity which in a long courſe of reaſoning is ſo deſirable. In addition to this, it has been ſuppoſed that the views which theſe two great men have taken of their ſubject, have not actually been ſo clear or ſo extenſive as they might be. *Grotius* is imagined, in making the ſtrong ſeparation which he does between the Law of Nature and the Law of Nations, to have confined the latter too much to actual convention.

Puffen-

Puffendorf, in affirming that the Law of Nations is *exactly* the ſame as the Law of Nature obeyed by individuals, only applied to ſtates, inſtead of men; is thought not to have entered deeply enough into the matter. For it is contended, that the particular application of this Law to Nations, is ſuſceptible of various modifications, according to the different nature of the ſubjects on which it has to work, and which conſequently renders the detail and minutiæ of it different from the mere Law of Nature as obeyed by individuals. Hence, therefore, ſomething was ſtill ſuppoſed to be wanting to the perfection of the ſcience. (*m*)

It was this which gave riſe to the Treatiſe of VATTEL, who, in his preface, has entered nicely into all theſe diſtinctions. Whether his objections to *Grotius* and *Puffendorf* were ſo weighty, as alone to render a new code neceſſary, it is perhaps needleſs to enquire. Certain it is, that the world is obliged to him for a very complete work, the model of which is more light and elegant than that of thoſe heavy though magnificent ſtructures which we have ſurveyed; for he has thoroughly cleared them from the cumbrous ornaments which were ſuppoſed to adorn them, and has rendered the way into the interior leſs difficult and obſcure. His method is excellent: he marſhals, in the outſet, a ſeries of preliminary principles, on which he profeſſes to found all his future reaſoning, and to which, in the courſe of it, he regularly refers. Whether his preliminaries, however, will always bear out his concluſions, it does not come within our intention to examine. At the ſame time one objection may, I think, fairly be made to him, which is, that he is too general, and often too ſlight, in his reaſoning, and attends too little to its particular application; a mode for the moſt part un-

(*m*) Vattel Dr. des Gens. Pref.

ſatisfactory,

ſatisfactory, and frequently dangerous. It is perhaps a conſequence of this, or to avoid the oppoſite fault of his two predeceſſors, that his work, though ſtored with excellent argument, is not ſufficiently ſupported by the authorities of caſes, without which even the reaſoning upon natural law will want much uſeful elucidation, but which forms the very eſſence and baſe of all that concerns what he calls the *poſitive* Law of Nations. (*n*]

The Treatiſe of *Vattel*, therefore, does not appear by any means to preclude the neceſſity of ſtudying the works of his maſters. Whoever, indeed, would underſtand his ſubject thoroughly, and become acquainted with the Law of Nations in all its nicety and extent, let what will be his own ſtores of knowledge, or the depth of his thought, can hardly arrive at the end he propoſes, without giving all his mind to the Treatiſes of thoſe wonderful men.

And thus I have done with the account of this intereſting Law, after having endeavoured, poſſibly with too great minuteneſs of attention, to trace its progreſs in Europe through all its various revolutions. We have ſeen it, comparatively regular, though cruel, under the *morality* of the Greeks and Romans. We have marked its annihilation under the followers of ODIN, and a barbarous religion: we have beheld it reviving under the influence of Chriſtianity! At the ſame time I have attempted to point out the effects of all local circumſtances upon that part of it which is *poſitive*; to trace the account of the uncertainty of the doctrines concerning it, till it is to be found reſting at laſt upon ſure ground, under the pilotage of the great Juriſt of the laſt century. The vaſt body of materials which has been brought together, has ſpun out the work to a length far beyond my expectation; yet I have purpoſely paſt aſide a variety

(*n*) Vattel Dr. des Gens. Pref.

of

of intereſting topics, and ſome very noble queſtions. I have done this, as well from the want of leiſure from other occupations, as from the fear of fatiguing the reader; nor am I inſenſible how little qualified in many points I have been, for the execution of a work, whoſe ſubject at leaſt muſt for ever be of conſequence to mankind. Yet am I not totally without the hope, that thoſe who are fond of inveſtigating the nature of their ſpecies as it is to be found in their actions, or who, not content with what is, are willing to be told what was, and how it came to be, will not abſolutely, throw away their time in peruſing what is now with great diffidence committed to the world.

F I N I S.

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